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INTRODUCTION.

It is perhaps an impossible task to arrange a work on the Law of Vendors and Purchasers upon a strictly logical basis.

The subject may be approached from the point of view either of the Vendor or of the Purchaser. The Vendor, if he is prudent, does not enter into a binding contract until he has considered his own capacity to sell, the nature of his title, and the evidence by which that title must be proved. If, as is commonly the case, he finds flaws in his title to the property which he proposes to sell, he declines to enter into an "open contract," under which he would be bound to show a good title for forty years, but inserts special stipulations which are intended to meet the objections of the Purchaser.

On the other hand, from the point of view of the Purchaser, the transaction begins with the contract of sale, and it is not as a rule until after the contract has been entered into that the Purchaser has any opportunity of ascertaining the nature of the Vendor's title.

Moreover, although in the case of sales by aucti
the Vendor usually prepares his abstract of
before he enters into the contract of sale, this i

no means the invariable practice in the case of sa by private treaty. The Vendor not unfrequen neglects "to look before he leaps," and does r consult his solicitor as to the nature of his title un after he has bound himself by a contract to se entered into by himself personally, or by some age whom he has employed. It seems, therefore, mc in accordance with what is in practice the usı sequence of events to determine in the first pla whether there has been a binding contract of sa before we enter into the consideration of how th contract must be carried into effect.

We shall accordingly first consider what constitu a contract; secondly, how that contract must evidenced in order to comply with the Statute Frauds; thirdly, what the contract should disclc in order that it may not be voidable by the Pu chaser; and fourthly, we shall consider those cas in which Vendor or Purchaser is under disabili or has only a limited capacity to sell or purcha land. When these preliminary matters have be concluded, we shall deal with investigation of tit the means by which the contract can be enforc and the manner in which completion should carried out.

THE LAW

RELATING TO

VENDORS AND PURCHASERS OF REAL AND LEASEHOLD PROPERT

PART I.

THE CONTRACT OF SALE.

CHAPTER I.

WHAT CONSTITUTES A CONTRACT.

SECTION 1.

NECESSITY FOR CONSENSUS AD IDEM.

Elements of Agreement.—Offer and Acceptance.— A contract for the sale of land may be constituted by a formal agreement in writing, or by an offer to sell or buy, as the case may be, made by one of the parties and an acceptance of it by the other or others; and this offer and acceptance may be contained in informal documents such as letters, or be by word of mouth

provided that there be written evidence of it, so as to satisfy the Statute of Frauds (*a*).

In the former case the parties are (in the absence of fraud, misrepresentation or mistake) bound by the written document and cannot go behind it (*b*). In the latter the question may arise whether there has in fact been a concluded agreement or whether what has passed amounts to nothing more than negotiation. An offer by itself does not of course constitute a contract (*c*); unless and until the offer has been accepted there is no consensus ad idem, that is to say, the minds of the parties have not come together. An offer may be revoked at any time before acceptance, even where there is a promise to keep the offer open until a particular date (*d*), unless this promise is founded on a valuable consideration (*e*).

As a general rule the acceptance of an offer ought to be notified to the offeror (*i.e.*, to the person who makes the offer); but since notification of acceptance is required for the benefit of the offeror he may dispense with notice to himself if he chooses to do so (*f*); and if the offeror expressly or impliedly intimates a particular mode of acceptance as sufficient it is only necessary for the person to whom the offer is made to follow the indicated method of acceptance. It is on

(*a*) 29 Car. 2, c. 3, s. 4, see below, Chap. II.

(*b*) If a man enters into a written agreement expressed in clear and unambiguous terms he cannot be heard to say he misunderstood it. See *Falck* v. *Williams*, [1900] A. C. 176, below, Chap. XVI., Sect. 4.

(*c*) See below, Sect. 3, as to Options.

(*d*) *Cooke* v. *Oxley* (1790), 3 T. R. 653; *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463; *Routledge* v. *Grant* (1828), 4 Bing. 653.

(*e*) *Reichel* v. *Bishop of Oxford* (1887), 35 Ch. D., at p. 48.

(*f*) *E.g.*, in the case of the offer of a reward.

this principle that it has been held that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, even though it never reaches its destination (*g*); and the rule is the same whenever the circumstances are such that it must have been within the contemplation of the parties that the post might be used as a means of communicating the acceptance (*h*).

On the other hand, the revocation of an offer is of no effect until it is communicated to the offeree, *i.e.*, brought to the mind of the person to whom the offer was made, so that the revocation of an offer, if sent by post, does not take effect from the time of posting, but from the time that it is received by the offeree (*i*).

It follows from what has been said that if the acceptance is posted before the letter containing a revocation of the offer has been delivered there is a binding contract (*h*).

Contract contained in Letters.—Where it is sought to make out an offer and acceptance from a number of letters, it is necessary to look at the whole correspondence (*j*) in order to determine whether it constitutes a contract. "You must not at one particular time draw a line and say, 'We will look at the letters

(*g*) *Dunlop* v. *Higgins* (1848), 1 H. L. Cas. 381; *Household Fire Co.* v. *Grant* (1879), 4 Ex. D. 216; but delivery of a letter to a postman to be posted is not posting. *Re London and Northern Bank*, [1900] 1 Ch. 220.

(*h*) *Henthorn* v. *Fraser*, [1892] 2 Ch. 27.

(*i*) *Byrne* v. *Van Tienhoven* (1880), 5 C. P. D. 344; *Henthorn* v. *Fraser*, [1892] 2 Ch. 27.

(*j*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311.

up to this point, and find in them a contract or not, but we will look at nothing beyond' " (*k*).

Thus, two letters, which, if they stood alone, would be sufficient evidence of a contract, may be shown by subsequent correspondence not to have contained all the terms of contract (*l*). On the other hand, if the two letters do constitute a complete agreement, the contract cannot be affected by the re-opening of negotiations between the parties in subsequent letters, unless those negotiations amount to a rescission of the contract by mutual consent (*m*).

Acceptance must be Unqualified.—If a person in accepting an offer introduces any new or different term into the proposed agreement, this variation must be acceded to by the other party before there is a concluded contract. Thus, where the purchaser offered to take an assignment of a lease on certain terms, and the vendor in his reply did not consent to assign the lease, but offered to grant an underlease upon precisely the same terms, and with the same clauses as the lease, it was held that there had been no acceptance (*n*). So, too, where the vendor's solicitor wrote a letter accepting the purchaser's offer, but enclosing a contract containing terms which had not been referred to in the offer, the court held that

(*k*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas., at p. 316.

(*l*) *Bristol, Cardiff and Swansea Aërated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616; *Williams* v. *Brisco* (1882), 22 Ch. D. 441.

(*m*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. at p. 321; *Bellamy* v. *Debenham* (1890), 45 Ch. D. 481; *Mason* v. *Von Buch* (1899), 15 T. L. R. 430.

(*n*) *Holland* v. *Eyre* (1825), 2 Sim. & St. 194.

there was no binding agreement (*o*). Though the refusal by the offeror of a distinct counter-offer by the offeree puts an end to the offeror's original offer (*p*), yet if the counter-proposal merely amounts to an inquiry whether the offeror will modify his terms, it does not operate as a rejection (*q*).

Acceptance, subject to a Condition.—Upon the same principle, there is no contract if the acceptance is made subject to a condition. For instance, where a proposed under-lessee signed a memorandum with the qualification that he agreed thereto, subject to there being nothing unusual in the leases of the ground landlord, he was held not to be bound (*r*). An acceptance, "subject to the title being approved by my solicitor," is not conditional (*s*), but the vendor, if he seeks to enforce specific performance, must prove either that his title was in fact approved, or that there was such a title tendered as made it unreasonable not to approve it (*t*). If the acceptance is subject to approval of title and *terms of contract*, there is no binding agreement, since the terms are left uncertain (*u*). A person who accepts an offer subject to a condition *which is solely for his own benefit*, may waive the condition and enforce specific

(*o*) *Jones* v. *Daniel*, [1894] 2 Ch. 332; *Crossley* v. *Maycock* (1874), L. R. 18 Eq. 180.

(*p*) *Hyde* v. *Wrench* (1840), 3 Beav. 334.

(*q*) *Stevenson* v. *M'Clean* (1880), 5 Q. B. D. 346.

(*r*) *Lucas* v. *James* (1849), 7 Hare, 410.

(*s*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. at p. 321; *Chipperfield* v. *Carter* (1895), 72 L. T. 487.

(*t*) *Clack* v. *Wood* (1882), 9 Q. B. D. 280.

(*u*) *Chatterley* v. *Nicholls* (1884), 1 T. L. R. 14.

performance in the terms of the offer (*v*); but the waiver must be made by the plaintiff before the defendant has repudiated the contract, otherwise the parties are never *ad idem* (*w*). If, however, the condition is intended to be for the benefit of *both* the parties (*x*), or for the benefit of the other party (*y*), it cannot be waived by the party who seeks to enforce the contract. Thus where what appears to be an agreement is expressed to be "subject to a formal contract being prepared and signed by both parties as approved by their solicitors," this stipulation must be regarded as a condition precedent (*z*).

"Parties often enter into a negotiation meaning that when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if, on seeing the result in that shape, they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that, though it may represent what he said, *it does not represent what he meant to say*" (*a*).

But where the formal contract is not *expressly* made a condition precedent of the acceptance, it is a question of construction whether the parties had

(*v*) *Cf. Bennett* v. *Fowler* (1840), 2 Beav. 302; *North* v. *Percival*, [1898] 2 Ch. 128, doubted in *Von Hatzveldt Wildenburg* v. *Alexander*, [1912] 1 Ch. 284.

(*w*) *Moritz* v. *Knowles* (1899), W. N. 40, 83.

(*x*) *Lloyd* v. *Nowell*, [1895] 2 Ch. 744.

(*y*) *Chinnock* v. *Marchioness of Ely* (1865), 4 De G. J. S. 638.

(*z*) *Watson* v. *McAllum* (1903), 87 L. T. 547; *Clark* v. *Robinson* (1903), 51 W. R. 443; *Winn* v. *Bull* (1877), 7 Ch. D. 29.

(*a*) *Per* Lord BLACKBURN in *Rossiter* v. *Miller* (1878), 3 App. Cas. at p. 1152.

really come to a final agreement, although they were subsequently to have a formal document drawn up. If there are grounds for inferring that all the essential terms of the contract are not to be treated as settled, but other terms are intended to be inserted in what is called the formal contract, there is no contract until what is called the formal contract is signed (*b*).

On the other hand, as stated by Lord HATHERLEY in *Rossiter* v. *Miller* (*c*): If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then . . . an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say we will have this agreement put into due form by a solicitor." Thus, if the vendor writes accepting the purchaser's offer, but adds that he has requested his solicitors "to forward you the agreement for purchase" (*d*), or has asked his solicitors "to prepare contract" (*e*), or direct his solicitor to "prepare a proper agreement for both parties to sign" (*f*), or to "prepare the necessary documents" (*g*), there is, nevertheless, a binding agreement between the parties, for no new term can be introduced into the formal contract, and the purchaser, if he signs the contract, will not have

(*b*) *Donnison* v. *People's Cafe Co.* (1882), 45 L. T. 187.

(*c*) (1878), 3 App. Cas. at p. 1143; and *cf.* judgment of Lord CAIRNS, at pp. 1137, 1138.

(*d*) *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124.

(*e*) *Bonnewell* v. *Jenkins* (1878), 8 Ch. D. 70.

(*f*) *Fowle* v. *Freeman* (1804), 9 Ves. 351.

(*g*) *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295.

agreed to anything more than he has already agreed to (*h*). On the other hand, when the purchaser wrote "send me the contract and I will get it signed" (*i*), or "please instruct your solicitor to forward the contract to me" (*k*), it has been held that the letter was not meant to complete the contract.

Where, however, instead of referring to a more formal document to be drawn up *in the future*, the vendor in his letter of acceptance actually encloses a formal contract for the purchaser's signature the decision must depend on whether this contract contains any special terms which have not already been agreed upon. If it does not contain any new term the agreement will be binding although the formal document remains unsigned (*l*).

SECTION 2.

CERTAINTY OF SUBJECT-MATTER AND OF THE TERMS OF THE CONTRACT.

Uncertainty of Subject-Matter.—In order to constitute an enforceable contract the terms of agreement must be certain. If the subject-matter of a contract is indefinite, there is no binding agreement. Thus where a vendor reserved "the necessary land for

(*h*) *Lewis* v. *Brass* (1877), 3 Q. B. D. 667.

(*i*) *Goodall* v. *Harding* (1885), 52 L. T. 127.

(*k*) *Hucklesby* v. *Hook* (1900), 82 L. T. 117.

(*l*) *Gibbons* v. *Board of Management of Metropolitan Asylum District* (1847), 11 Beav. 1, where, however, the enclosed contract was not put in evidence. See also *Crossley* v. *Maycock* (1874), L. R. 18 Eq. 180; *Jones* v. *Daniel*, [1894] 2 Ch. 332; *Filby* v. *Hounsell*, [1896] 2 Ch. at p. 742.

making a railway through the estate to Prince Town," JESSEL, M.R., said: "I neither know what is the amount of land necessary for a railway, nor what line the railway is to take, and therefore I cannot enforce specific performance of the contract" (*m*). But when the subject-matter is capable of ascertainment, mere uncertainty as to the measurement of the land is not necessarily fatal (*n*).

Uncertainty of Price.—A fixed price is an essential ingredient in a contract for sale of land (*o*). The court will enforce a contract to sell at a fair valuation (*p*), but where the mode of valuation is specified the court will not, as a rule, give relief unless and until the price has been ascertained by the prescribed means. Thus, if the property is to be valued by a specified person, and he dies before making the valuation, the contract fails (*q*). But when the property to be valued is only an adjunct of the purchase, and not an essential part thereof, the court will enforce the purchase except so far as it relates to the property to be valued (*r*).

(*m*) *Pearce* v. *Watts* (1875), L. R. 20 Eq. 492; *Lindsay* v. *Lynch* (1804), 2 Sch. & Lef. 7. See also *Douglas* v. *Baynes*, [1908] A. C. 477.

(*n*) *Jenkins* v. *Green* (1858), 27 Beav. 437; *Sanderson* v. *Cockermouth Rail. Co.* (1849), 11 Beav. 497; and *cf.* decisions of KEKEWICH, J., in *Wylson* v. *Dunn* (1887), 34 Ch. D. 569; *North* v. *Percival*, [1898] 2 Ch. 128.

(*o*) *Milnes* v. *Gery* (1807), 14 Ves. 408.

(*p*) *Wilks* v. *Davis* (1817), 3 Meri. 509; and *cf.* *Marsh* v. *Jones* (1889), 40 Ch. D. 563.

(*q*) *Firth* v. *Midland Rail. Co.* (1875), L. R. 20 Eq. 100.

(*r*) *Richardson* v. *Smith* (1870), L. R. 5 Ch. 648.

Uncertainty of other Terms.—If the agreement furnishes a standard from which the terms can be ascertained, the maxim applies *id certum est quod certum reddi potest* (*s*). Moreover, if all the *essential* terms of an agreement for the sale of land have been determined, the fact that some minor details are left unsettled will not, in the case of an informal memorandum, prevent the contract from being held binding (*t*).

Thus it is not uncommon on a sale of real estate that the time for completion should not be fixed, and if no time is fixed, the inference is, that the completion will be within a reasonable time (*u*). Consequently, where a purchaser in accepting an offer said: "I should like to know from what time the vendor wishes the purchase to date," it was held by the Court of Appeal that there was, nevertheless, a concluded contract (*v*). If, however, the contract is for the sale of the *goodwill* of a business, in addition to the sale of real estate, the time for completion is one of the essential terms of the contract (*w*).

(*s*) *Foster* v. *Wheeler* (1888), 38 Ch. D. 130; *Pickles* v. *Sutcliffe*, [1902] W. N. 200.

(*t*) *Cayley* v. *Walpole* (1870), 39 L. J. Ch. 609; *Gray* v. *Smith* (1889), 43 Ch. D. at pp. 219, 220. "When a memorandum is intended to be worked out by a formal document, it is not necessary that every stipulation which would be contained in the latter document shall be indicated."

(*u*) *Gray* v. *Smith* (1889), 43 Ch. D. 214.

(*v*) *Simpson* v. *Hughes* (1897), 76 L. T. 237.

(*w*) *Donnison* v. *People's Café Co.* (1882), 45 L. T. 187; *May* v. *Thomson* (1882), 20 Ch. D. 716.

SECTION 3.

OPTIONS OF PURCHASE.

Conditions Precedent.—Where an option of purchase of real estate has been created either by contract (as in the case of partnership deeds and leases) or under the provisions of a will, the conditions imposed upon the exercise of the option are always strictly construed (*x*). All precedent conditions must be fulfilled by the purchaser before any contract binding the vendor can arise (*y*). In the case of a building agreement with the common provision that the building lessee shall have an option to purchase the freehold reversion, it is a question of construction whether it is a condition precedent to the exercise of the option that the lessee shall not have made default under the building agreement (*z*). If a period is fixed for the exercise of the option, a sufficient notice of intention to exercise the option must be given *within the prescribed time*, and time is of the essence of the contract (*a*). An option to purchase or right of pre-emption must be so limited as not to be obnoxious to the rule against perpetuities unless the right is expressly conferred by statute (*b*), and an unlimited

(*x*) Dart, Vendors and Purchasers, 7th ed., 272.

(*y*) *Weston* v. *Collins* (1865), 11 Jur. (N.S.) 190.

(*z*) *Raffety* v. *Schofield*, [1897] 1 Ch. 937.

(*a*) *Bird* v. *Brown* (1850), 4 Ex. 786; *Holland* v. *King* (1848), 6 C. B. 727; *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348.

(*b*) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562; *Manchester Ship Canal* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37.

option of purchase, although contained in a lease, is void for remoteness and cannot be enforced by specific performance (c). In one case a right of pre-emption created by contract was construed as limited to the life of the owner of the property (d).

Assignment of Option.—Primâ facie an option is not personal to the donee, and may be exercised by his assigns, but an option of purchase conferred by a testator on his son has been held to be personal to the son (e).

An option in a lease for the lessee, his executors, administrators, or *assigns*, to purchase the reversion, is attached to the lease and passes with it, the word assigns meaning assigns of the term (f). An equitable assignee of a lease cannot exercise an option to purchase the reversion (g).

If an option of purchase is not exercised until after the death of the person who created the option, notice of intention to exercise it should be given to both the real and personal representatives (h). According to

(c) *Woodall* v. *Clifton*, [1905] 2 Ch. 257; but as to the right to damages, see *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532.

(d) *Stocker* v. *Dean* (1852), 16 Beav. 161, *sed quære.*

(e) *Re Cousins* (1885), 30 Ch. D. 203.

(f) *Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394.

(g) *Friary Holroyd & Co.* v. *Singleton*, [1899] 1 Ch. 86.

(h) *Cf. Re Isaacs*, [1894] 3 Ch. 506, where notice was given both to the heir-at-law and the administrator. But since the Land Transfer Act, 1897, the real and personal representatives are usually the same persons.

the rule in *Lawes* v. *Bennett* (*i*), the purchase-money forms part of the personal estate of the person creating the option, unless he has in his will indicated a contrary intention (*k*).

(*i*) (1785), 1 Cox, 167.

(*k*) *Re Pyle*, [1895] 1 Ch. 724.

CHAPTER II.

HOW THE CONTRACT MUST BE EVIDENCED.

Statute of Frauds.—It is enacted by s. 4 of the Statute of Frauds (*a*) that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them (*b*), unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

SECTION 1.

CONTENTS OF THE MEMORANDUM.

The Contracting Parties.—The names of *both* the contracting parties must be specified in the memorandum, or there must be such a description of them as to establish their identity, and the court will not

(*a*) 29 Car. 2, c. 3.

(*b*) *Cf. Jarvis* v. *Jarvis* (1893), 63 L. J. Ch. 10, where certain machinery was held to be an interest in land within this section. As to trees and growing produce, see *Smith* v. *Surman* (1829), 9 B. & C. 561; *Marshall* v. *Green* (1875), 1 C. P. D. 35. As to "building materials" of a house, see *Lavery* v. *Pursell* (1888), 39 Ch. D. 508. As to an easement, see *McManus* v. *Cooke* (1887), 35 Ch. D. at p. 687. See also learned article in 2 Jur. (N.S.) Part II. p. 71.

"be astute to discover descriptions which a jury could not identify" (c).

Thus, if one of the contracting parties is simply described as "the vendor" (d), or as "my client," "my principal," or "my friend" (e), or as "the landlord" (f), the contract cannot be enforced. On the other hand, "proprietor" (g) is a sufficient description, and so also is "owner," "mortgagee" (h), and "trustee for sale" (i), and where it appeared from the conditions of sale that the vendor was a company in possession of the property, that was held to be enough (k).

It is sufficient to satisfy the Statute of Frauds for the memorandum to disclose the names of the actual contracting parties, although they may be agents for undisclosed principals. Who the principals are may be proved by parol evidence (l).

The Terms of Contract.—Not only is it necessary that the identification of the parties should be found in the written memorandum, but it is also essential

(c) *Commins* v. *Scott* (1875), L. R. 20 Eq. 11.

(d) *Potter* v. *Duffield* (1874), L. R. 18 Eq. 4; *Jarrett* v. *Hunter* (1886), 34 Ch. D. 182; *Lavery* v. *Pursell* (1888), 39 Ch. D. at p. 518.

(e) *Rossiter* v. *Miller* (1878), 3 App. Cas. 1141.

(f) *Coombs* v. *Wilkes*, [1891] 3 Ch. 77.

(g) *Sale* v. *Lambert* (1874), L. R. 18 Eq. 1; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124.

(h) *Jarrett* v. *Hunter* (1886), 34 Ch. D. 182; *Potter* v. *Anstruther* (1893), 69 L. T. 175.

(i) *Catling* v. *King* (1877), 5 Ch. D. 660.

(k) *Commins* v. *Scott*, *supra*. *Cf.* also *Carr* v. *Lynch*, [1900] 1 Ch. 613.

(l) *Morris* v. *Wilson* (1859), 5 Jur. (N.S.) 168; *Filby* v. *Hounsell*, [1896] 2 Ch. 737.

that the intention to sell should be expressed, and that the subject-matter, the price, and all other essential terms of the contract should be determined thereby (*m*). Thus in a case where the memorandum purported to impose on the purchaser stringent conditions the effect of which largely depended upon the actual date of sale, a mistake in the memorandum as to the date of sale was held to be fatal (*n*). It has also been held that the entry made by an auctioneer in his sale book does not satisfy the requirements of the statute if it does not expressly refer to the particulars and conditions subject to which the sale was made (*o*).

The Subject-Matter.—With regard to the identification of the property which is to be sold, a very general description is sufficient to satisfy the statute. Thus it is enough to describe the property as having been sold on a given day at a given place by a particular person (*p*); and it appears that "all that farm formerly in the tenancy of A. which was devised by B. to C." would be a sufficient description, even though the farm was not mentioned in the will and passed as part of the residue (*q*). So in the case of *Ogilvie* v. *Foljambe* (*r*) "Mr. Ogilvie's house," and in the case of *Bleakley* v. *Smith* (*s*) the "property in Cable Street,"

(*m*) *Skelton* v. *Cole* (1857), 1 De G. & J. 587.

(*n*) *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434.

(*o*) *Rishton* v. *Whatmore* (1878), 8 Ch. D. 467.

(*p*) *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90.

(*q*) *Ibid.*, at p. 95.

(*r*) (1817), 3 Meri. 53, approved by Lord DAVEY in *Bank of New Zealand* v. *Simpson*, [1900] A. C. 188.

(*s*) (1840), 11 Sim. 150.

in *Sidle* v. *Bond-Cabbell* (*t*) "a plot situate near Church Street, Cromer," and in *Plant* v. *Bourne* (*u*) "twenty-four acres of land at Totmonstow" were held to be sufficient descriptions. In these cases parol evidence is admitted to show what property was intended.

SECTION 2.

THE SIGNATURE OF THE MEMORANDUM.

What is Sufficient Signature.—It is to be observed that the memorandum need only be signed by "the party to be charged," and it was established in the leading case of *Seton* v. *Slade* (*v*) that an agreement signed by one party only is good to charge him within the statute. Moreover, where an offer in writing signed by one party contains the terms which he proposes as an agreement, the other party may accept *by parol*, *e.g.*, by conduct, for the statute only requires a "memorandum in writing," and not an "agreement in writing" (*x*). Thus a verbal acceptance of one of two alternatives contained in a written and signed offer is sufficient to constitute an enforceable contract as against the writer (*y*). The signature may be

(*t*) (1885), 2 T. L. R. 44.

(*u*) [1897] 2 Ch. 281, and see cases collected in judgment of CHITTY, L.J., in *Sheers* v. *Thimbleby* (1897), 76 L. T. 709.

(*v*) Wh. & Tud., L. C. Eq., 8th ed., Vol. II., 478, and notes thereto.

(*x*) *Reuss* v. *Picksley* (1866), L. R. 1 Ex. 342, explained by COTTON, L.J., in *Re New Eberhardt Co.* (1889), 43 Ch. D., at p. 118; see also *Filby* v. *Hounsell*, [1896] 2 Ch., at p. 740.

(*y*) *Lever* v. *Koffler*, [1901] 1 Ch. 543. The dictum of FRY, J., in *Munday* v. *Asprey* (1880), 13 Ch. D. 857, that the statute requires a concluded agreement *existing at the date* when the memorandum is signed cannot be reconciled with the decision of BYAM, J., in *Lever* v. *Koffler*.

printed or stamped (z), and a signature by mark or initials or by the surname without the Christian name is sufficient (a). Moreover, there is no necessity for the signature to be at the foot of the memorandum; it may be at the beginning or in the body of the document (b), but it must be placed in such a position as to authenticate and refer to the material part of it (c).

Intention in Signing.—Moreover, "the question is not one of the intention of the party who signs the document, but simply of evidence against him. The court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose" (d). Consequently it is immaterial that the writing which is relied on as a memorandum of the contract for the purpose of the Statute of Frauds was signed *alio intuitu* (e). Thus a letter written by the vendor to a third party, containing directions to carry the agreement into execution, is a sufficient memorandum, and so also is a letter which contains an admission

(z) *Schneider* v. *Norris* (1814), 2 M. & S. 286.

(a) Leake, Contracts, 185.

(b) *Evans* v. *Hoare*, [1892] 1 Q. B. 595; *Bleakley* v. *Smith* (1840), 11 Sim. 150; but *cf. Bucklesby* v. *Hook* (1900), 82 L. T. 117.

(c) *Kronheim* v. *Johnson* (1877), 7 Ch. D., at p. 60.

(d) *Per* Lord BOWEN in *Hoyle* v. *Hoyle*, [1893] 1 Ch. 99.

(e) This doctrine is now fully established, and compare Dart, Vendors and Purchasers, 6th ed., 272, with 7th ed., 258; and see *Daniels* v. *Trefusis*, [1914] 1 Ch. 788.

of the bargain, and all the essential terms of it, notwithstanding that the writer repudiates his liability (*f*). Again, the signature of the chairman of a company affixed to the minute book for the purpose of verifying an entry therein may constitute a memorandum which satisfies the requirements of the statute (*g*); and it has been held by KEKEWICH, J., that a signed engrossment of a lease, although only delivered as an escrow, is sufficient evidence of an agreement (*h*). On the other hand, there must in every case be a valid contract in existence independent of the memorandum of it. It must be remembered that the Statute of Frauds is a weapon of *defence*, not of *offence*, and does not make a signed document which complies with its provisions a valid contract if it is not such, "according to the good faith and real intention of the parties" (*i*).

SECTION 3.

CONNECTING DOCUMENTS.

Separate Documents.—The terms of the contract need not all appear in the written document signed by the party to be charged, but may be contained in two or more pieces of paper, but these must be *so connected that you can read them together* so as to

(*f*) See cases cited in *Gibson* v. *Holland* (1865), L. R. 1 C. P., at p. 6; *Dewar* v. *Mintoft*, [1912] 2 K. B. 373; *Daniels* v. *Trefusis*, [1914] 1 Ch. 788.

(*g*) *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314.

(*h*) *Moritz* v. *Knowles*, [1899] W. N. 40, *sed quære*. The case would be far stronger with respect to a conveyance which almost invariably recites the contract of sale. *Cf. Munday* v. *Asprey* (1880), 13 Ch. D. 855.

(*i*) *Jervis* v. *Berridge* (1873), L. R. 8 Ch. 360.

form one memorandum of the contract between the parties (*k*).

The difficulty which arises in cases of this kind is whether parol evidence can be given to connect the various documents together. The rule, as stated by KEKEWICH, J., in *Oliver* v. *Hunting* (*l*), is "that if you can find a *reference* to *something*, which may be a conversation, or may be a written document, you may give (parol) evidence to show whether it was a conversation or a written document, and having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved." Thus if A. writes to B. saying that he will give £1,000 for B.'s estate, and stating the terms in detail, and B. simply writes back, "I accept your *offer*," you may show by parol evidence that the offer alluded to by B. is that made by A. (*m*).

So where a letter signed by the defendant referred to "our *arrangement* to hire a carriage," parol evidence was admitted to prove that the only arrangement to which he could have referred was a written memorandum signed by the plaintiff, and setting forth the terms of the contract (*n*). Again, where "*instructions*" were referred to, it was held that it might be shown by parol evidence that the instructions had been given in writing, and that there had been no other instructions than the written document which was produced (*o*).

(*k*) *Rishton* v. *Whatmore* (1878), 8 Ch. D. 467.

(*l*) (1890), 44 Ch. D., at p. 205.

(*m*) *Per* BRAMWELL, L.J., in *Long* v. *Millar* (1879), 4 C. P. D. 450.

(*n*) *Cave* v. *Hastings* (1881), 7 Q. B. D. 125.

(*o*) *Ridgway* v. *Wharton* (1857), 27 L. J. Ch. 46.

When the contract was expressed to be "subject to the conditions of the Halifax Incorporated Law Society" evidence was admitted to identify a printed copy of the conditions of the society which were in force when the contract was entered into (*p*).

Parol evidence has been admitted to show that two documents dealing with the same matter were contained in the same envelope (*q*), and to connect a letter addressed "dear sir" with the direction on the envelope in which it was sent (*r*).

One of the strongest cases as to connecting documents is *Long* v. *Millar* (*s*). In that case the vendor signed a deposit receipt containing the name of the purchaser and the amount of the deposit, which was referred to as a deposit "on the *purchase* of three plots of land at Hammersmith." The Court of Appeal held that the words referring to the purchase were sufficient to incorporate a memorandum of agreement signed by the purchaser, and that the two formed a written contract which satisfied the statute. This decision has been followed by NORTH, J., in *Studds* v. *Watson* (*t*), by KEKEWICH, J., in *Oliver* v. *Hunting* (*u*), and by the Court of Appeal in *Sheers* v. *Thimbleby* (*v*).

It is conceived that you cannot cure a defect in the memorandum signed by the party to be charged by

(*p*) *Pickles* v. *Sutcliffe*, [1902] W. N. 200.

(*q*) *Kronheim* v. *Johnson* (1877), 7 Ch. D. 60.

(*r*) *Pearce* v. *Gardner*, [1897] 1 Q. B. 688; *Last* v. *Hucklesby*, [1914] W. N. 157.

(*s*) (1879), 4 C. P. D. 450.

(*t*) (1884), 28 Ch. D. 305.

(*u*) (1890), 44 Ch. D. 205, but see *contra*, *Coombs* v. *Wilkes*, [1891] 3 Ch. 77; *Potter* v. *Peters* (1895), 64 L. J. Ch. 357.

(*v*) (1897), 76 L. T. 709.

referring to some other document unless such other document was *previously existing* (*x*), but it is difficult to reconcile this view with certain decisions (*y*).

SECTION 4.

THE DOCTRINE OF PART PERFORMANCE.

Effect of Non-compliance with Statute.—A contract which fails to comply with the requirements of the Statute of Frauds is not void, but merely unenforceable. The statute simply bars the legal remedies by which the contract might otherwise be enforced (*z*).

Part Performance.—But when the contract has been partly performed by the parties thereto, and acts have been done which must, of their nature, be referable to the contract, equities arise which cannot be administered unless the contract is regarded. In such a case the court has jurisdiction, notwithstanding the Statute of Frauds, to inquire into the actual contract which has been made, and, having discovered by parol evidence the terms of that contract, to enforce its performance (*a*).

This is the equitable doctrine of part performance.

Possession of Property.—The commonest application of this doctrine is where a purchaser under

(*x*) *Williams* v. *Jordan* (1877), 6 Ch. D., at p. 520.

(*y*) *Bourdillon* v. *Collins* (1871), 24 L. T. 344.

(*z*) *Crosby* v. *Wadsworth* (1805), 6 East, 602; *Leroux* v. *Brown* (1852), 12 C. B. 801; *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123.

(*a*) See *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; see also *Lester* v. *Foxcroft*, and notes thereon, Wh. & Tu. L. C. Eq., 8th ed., Vol. II., 464.

a parol contract is let into possession of the property before completion. The court finding a stranger in acknowledged possession of the land, who would, primâ facie, be a trespasser, can only explain his being there by the supposition of an *antecedent* contract (*b*). If the entry into possession was prior to the contract, it cannot be regarded as an act of part performance (*c*), but the subsequent *continuance in possession* may, under certain circumstances, constitute an act of part performance (*d*).

Payment of Deposit, etc.—An act, in order to amount to part performance, must be *unequivocal*, and an act which, though in truth done in pursuance of a contract, admits of explanation without presupposing a contract, is not in general sufficient to take the case out of the statute (*e*). For this reason the payment of a deposit, or even of the whole purchase-money, is not an act of part performance, since it is not of itself indicative of a contract for the sale of land (*f*). So, too, giving instructions for the conveyance to be drawn and engrossed, and going to take a view of the estate (*g*), making an admeasure-

(*b*) *Morphett* v. *Jones* (1818), 1 Sw. 181. It is essential that possession should be delivered according to the contract, and *not be obtained wrongfully*.

(*c*) *Parker* v. *Smith* (1845), 1 Coll. 623.

(*d*) *Hodson* v. *Heuland*, [1896] 2 Ch. 428.

(*e*) *Dale* v. *Hamilton* (1846), 5 Hare, 369; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467.

(*f*) *Clinan* v. *Cooke* (1802), 1 Sch. & Lef. 40; *Hughes* v. *Morris* (1852), 2 De G. M. & G. 356.

(*g*) *Clerk* v. *Wright* (1736), 1 Atk. 12; but *cf. Dickinson* v. *Barrow*, [1904] 2 Ch. 339.

ment of the property (*h*), or the employment of surveyors to value the timber (*i*), are equivocal acts which do not amount to part performance. The delivery of an abstract, even when accompanied with the deeds, is not sufficient (*k*), but if, after receiving the abstract, the purchaser examines it with the deeds and makes requisitions, it is doubtful whether he could subsequently set up the statute (*l*).

It must also be remembered that the act of part performance must be by the person seeking to enforce the parol agreement (*m*). Part performance by the defendant is of no avail.

Lastly, it should be borne in mind that the fact that there has been a part performance of the contract cannot be made use of for the purpose of obtaining damages in cases where specific performance could not have been obtained (*n*).

SECTION 5.

FRAUD.

Statute inapplicable.—Apart from the doctrine of part performance, the court will not, in the words of GIFFORD, L.J., "allow the Statute of Frauds to be made an instrument of fraud" (*o*). Thus, in

(*h*) *Pembroke* v. *Thorpe* (1740), 3 Swans. 442 n.

(*i*) *Whitbread* v. *Brockhurst* (1778), 1 Bro. C. C. 412.

(*k*) *Whaley* v. *Bagnell* (1765), 1 Bro. P. C. 345.

(*l*) *Thomas* v. *Brown* (1876), 1 Q. B. D., at p. 714.

(*m*) *Caton* v. *Caton* (1866), L. R. 1 Ch., at p. 137. This principle seems to be somewhat lost sight of in *Dickinson* v. *Barrow*, [1904] 2 Ch. 339.

(*n*) *Lavery* v. *Pursell* (1888), 39 Ch. D., p. 508.

(*o*) *Heard* v. *Pilley* (1869), L. R. 4 Ch., p. 548.

Whitchurch v. *Bevis* (*p*), Lord THURLOW stated that if the agreement is prevented from being put into writing by the fraud of one of the parties, he cannot afterwards shelter himself under the statute. So, too, it has been held that parol evidence was admissible to prove a fraud where the defendant insisted that a conveyance was absolute which was really intended as a mortgage (*q*).

For recent applications of this doctrine the reader is referred to *Davis* v. *Whitehead* (*r*) and *Rochefoucauld* v. *Boustead* (*s*) and the cases there cited.

SECTION 6.

STAMP DUTY ON CONTRACT OF SALE.

Contract under hand only.—If the contract is under hand only, it is liable, when the subject-matter is of the value of £5 or upwards, to a stamp duty of 6*d*. (*t*). An adhesive stamp may be used, but it must be affixed *before* signature, and must be cancelled by the person who first executes the agreement (*u*). An *impressed* stamp can be affixed within fourteen days after execution without a penalty by the indulgence of the commissioners, except where the contract contains a provision that "no objection is to be taken on the ground of insufficiency of stamps on documents

(*p*) (1789), 2 Bro. C. C., at p. 56; *cf. Chattock* v. *Muller* (1878), 8 Ch. D. 177.

(*q*) *Lincoln* v. *Wright* (1859), 4 De G. & J. 16.

(*r*) [1894] 2 Ch. 133.

(*s*) [1897] 1 Ch. 196.

(*t*) Stamp Act, 1891 (54 & 55 Vict. c. 39).

(*u*) *Ibid.*, ss. 8, 22.

executed before the 17th May, 1888." After fourteen days it can only be stamped on payment of a penalty of £10 (*v*).

Contract under Seal.—If the contract is under seal, it cannot be received in evidence unless stamped as a deed, *i.e.*, with a 10*s.* stamp which may be impressed at any time within thirty days of the execution of the contract (*x*).

Special Cases.—If the subject-matter of the contract be an equitable interest, such as an equity of redemption, the contract may be stamped with *ad valorem* duty as a conveyance on sale, in which case the subsequent conveyance will only require a deed stamp (*y*). But this course is neither necessary nor desirable except in the case of a sale to a company (*z*), since a 6*d.* stamp is sufficient for the purpose either of enforcing specific performance or recovering damages for breach of contract (*a*).

A contract by a trustee in bankruptcy for the sale of the bankrupt's real estate is exempt from stamp duty by virtue of s. 144 of the Bankruptcy Act, 1883 (*b*).

A contract contained in a series of letters can be

(*v*) Stamp Act, 1891, s. 15.

(*x*) *Ibid.*, s. 15.

(*y*) *Ibid.*, s. 59 (1), (3).

(*z*) *I.e.*, when it is necessary to register the contract under s. 88 of the Companies (Consolidation) Act, 1908.

(*a*) Stamp Act, 1891, s. 59 (4).

(*b*) *Flather* v. *Stubbs* (1842), 2 Q. B. 614.

proved under one stamp, which may be impressed on any letter of the series (*c*).

A purchaser of several lots at an auction must pay stamp duty in respect of each lot of the value of £5, or upwards, since a separate agreement in respect of each lot is considered to have been entered into (*d*).

(*c*) Alpe, Stamp Duties, 10th ed., 53.

(*d*) *James* v. *Shore* (1816), 1 Stark. 426.

CHAPTER III.

THE CONTRACT MUST NOT BE MISLEADING.

Section 1.

Misdescription.

Vendor must describe Property accurately.—The description of the property in the contract must be accurate, otherwise the purchaser will, as a general rule, be entitled to rescind it on the ground of misrepresentation. For example, an underlease must not be described in the contract as a lease (*a*). But should the purchaser be aware that the vendor's interest is an underlease only, he will be bound, although the contract describe the interest as a lease (*b*), and where the vendor agreed to sell *all his interest* in a lease, the purchaser was compelled to accept an underlease for a term less by three days than the original term (*c*). Where the contract is for the sale of a *leasehold ground rent* it is not necessary to disclose the fact that there is a nominal reversion of one day outstanding, if this nominal reversion is held on trust for the vendor (*d*).

(*a*) *Madeley* v. *Booth* (1848), 2 De G. & Sm. 718; *Re Beyfus and Master's Contract* (1888), 39 Ch. D. 110. Section 4 of the Conveyancing Act, 1892, has not altered this rule. See *Broom* v. *Phillips* (1896), 74 L. T. 459.

(*b*) *Flood* v. *Pritchard* (1879), 40 L. T. 873; *Camberwell, etc. Society* v. *Holloway* (1879), 13 Ch. D. 754; *Henderson* v. *Hudson* (1867), 15 W. R. 860.

(*c*) *Waring* v. *Scotland* (1888), 57 L. J. Ch. 1016.

(*d*) *Re Scott and Eave's Contract* (1902), 86 L. T. 617.

Construction of Particular Expressions.—It may be convenient here to examine the construction which has been put on particular expressions employed in contracts for the sale of land.

An *underlease* generally means an underlease of the whole premises comprised in the original lease; while a *derivative* lease is a lease derived from the original lease, but only comprising part of the property (*e*).

A "*brick-built house*" is understood to mean a house brick-built in the ordinary sense of the word, not composed externally partly of brick and partly of timber and lath and plaster (*f*).

"*Clear yearly rent*" is understood to mean a rent free from all deductions usually paid by a tenant, but subject to such as are borne by a landlord, such as land tax (*g*).

Annual rental does not necessarily imply an annual tenancy at a net rent, but may refer to the aggregate gross rent derived from monthly tenancies, when the landlord pays rates and taxes (*h*), but annual *rent* would, it is presumed, mean *net* rent on a yearly tenancy.

"*Ground rent*" is understood to be a rent less than the rack-rent (*i*). It is the sum paid by the owner or builder of houses for the use of land to build on, and is therefore much under what it lets for when it has been built on (*k*). When a man buys a ground rent

(*e*) *Brumfit* v. *Morton* (1857), 3 Jur. (N.S.) 1201.

(*f*) *Powell* v. *Doubble* (1832), Sudgen, Vendors and Purchasers, 14th ed., 29.

(*g*) *Tyrconnel* v. *Ancaster* (1754), 2 Ves. 500.

(*h*) *Re Edwards to Sykes & Co., Limited* (1890), 62 L. T. 445.

(*i*) *Stewart* v. *Alliston* (1815), 1 Meri. 26.

(*k*) *Bartlett* v. *Salmon* (1855), 6 De G. M. & G. 41.

he buys the *reversion* of lands which are built upon, and for which the tenant is paying rent (*l*).

A "*rentcharge*" is, strictly speaking, a rent issuing out of land and charged thereon, with a power of distress (*m*). A rentcharge is distinguished from a rent *service* by the absence of any tenure between grantor and grantee (*n*). In the West of England rentcharges are frequently described as "ground rents," while in Manchester they are almost invariably called "chief-rents." A chief-rent is, strictly speaking, a quit-rent payable by a freehold tenant of a manor. Formerly, if the power of distress were omitted in the deed creating the rent, it was known as a rent *seck* (*o*); but since the Act 4 Geo. 2, c. 28, which confers a statutory power of distress, a rent seck may be accurately described as a rentcharge. A "*yearly rent*," charged on the rates of a corporation under s. 11 of the Lands Clauses Act, 1845 (*p*), may be described as a rentcharge in the particulars of sale (*q*).

A "*fee-farm rent*" is properly a rent *service* reserved on a grant in fee (*r*), which, since the Statute of *Quia Emptores* (*s*), can only be created by the Crown. The

(*l*) *Evans* v. *Robins* (1862), 31 L. J. Ex. 465.

(*m*) *Re Lord Gerard and Beecham's Contract*, [1894] 3 Ch., at p. 295, *per* CHITTY, J.

(*n*) *Esdaile* v. *Stephenson* (1822), 1 Sim. & St. 124; Shelford, Real Property Statutes, 9th ed., 105.

(*o*) Littleton, s. 218.

(*p*) 8 & 9 Vict. c. 18.

(*q*) *Re Lord Gerard and Beecham's Contract*, [1894] 3 Ch. 295.

(*r*) *See* Hargrave's Edition of Co. Lit., 144.

(*s*) 18 Edw. 1, c. 1.

expression, however, is generally used to describe a perpetual rentcharge in fee simple (*t*).

The word "*farm*" will include woodlands forming part of an estate, though not in the occupation of the tenant (*u*).

The description of property as "*well supplied with water*" has been held to indicate a natural supply, and to be a misdescription in a case where the supply was derived from the borough waterworks subject to the usual rates (*x*).

A "*beerhouse*" is a place where beer is sold to be consumed on the premises (*y*), as opposed to a "beer-shop," which is a place where beer is sold to be consumed off the premises (*z*). Upon the sale of a beer-shop "with the off beer licence attached thereto," there is no obligation on the vendor to procure from the magistrates the temporary authority for the purchaser to carry on the business until the next special sessions for transferring licences, and there is no implied warranty by the vendor either that such interim protection will be obtained or that the licence will be ultimately transferred (*a*).

Puffing Statements.—Notwithstanding that it is the duty of the vendor to describe the estate with

(*t*) *Bradbury* v. *Wright* (1781), 2 Doug. 624.

(*u*) *Portman* v. *Mill* (1839), 3 Jur. 356.

(*x*) *Leyland* v. *Illingworth* (1860), 2 De G. F. J. 248.

(*y*) *Pease* v. *Coats* (1866), L. R. 2 Eq. 688.

(*z*) *London and Suburban Land and Building Co.* v. *Field* (1881), 16 Ch. D. 645.

(*a*) *Tadcaster Tower Brewery Co.* v. *Wilson*, [1897] 1 Ch. 705 As to conviction indorsed on the licence, see *Re Ward and Jordan's Contract*, [1902] 1 I. R. 73.

accuracy and minuteness in the contract, mere puffing expressions or statements of value on the part of the vendor, which are in effect an *expression of his own opinion*, will not avoid the contract.

Thus, the statement that a house is "substantial" (*b*), or is "well built" (*c*), or is a "residence for a family of distinction" (*d*), are merely commendatory statements which do not amount to a misdescription. So, too, a purchaser was held to his contract where the property, which was really worth about £200 a year, was described as of the "*estimated* value of £400" (*e*).

On the other hand, the statement that the property is let to "a most desirable tenant" is not a mere expression of opinion, but amounts to an implied assertion that the vendor knows no facts leading to the conclusion that the tenant is not desirable (*f*). Again, when property which was described as "ripe for immediate development," could not in fact be used as building land without going to very great expense, the purchaser was held to be entitled to rescind the contract (*g*).

The expression *eligible* is the ordinary auctioneer's

(*b*) *Johnson* v. *Smart* (1860), 2 Gif. 151.

(*c*) *Kennard* v. *Ashman* (1894), 10 T. L. R. 214; and *cf. Green* v. *Symons* (1897), 13 T. L. R. 301.

(*d*) *Magennis* v. *Fallon* (1829), 2 Moll. 587.

(*e*) *Re Hurlbalt and Chaytor's Contract* (1888), 57 L. J. Ch. 421.

(*f*) *Smith* v. *Land and House Property Corporation* (1884), 28 Ch. D. 7.

(*g*) *Baker* v. *Moss* (1902), 66 J. P. 360; and see *Re Puckett and Smith's Contract* [1902], 2 Ch., at p. 264.

trees (o); and the expression timber and timberlike trees has been held to include sound pollards (p).

Where timber upon a copyhold estate, or upon an estate part freehold and part copyhold, is to be paid for separately, it should be borne in mind that if the contract is sufficiently explicit upon the point, the timber upon the copyhold portion of the property will be included in the valuation, even though the copyhold portion cannot be distinguished from the freehold, and the purchaser will be compelled to take it subject to the right of the lord and custom of the manor. But if the contract for the purchase of the timber be separate from that of the estate, the purchaser will be entitled to such possession of it as will entitle him to fell and remove it (q).

If no mention is made as to separate payment for common fixtures, they will be included in the contract, unless the contrary may be gathered from the context (r).

If the property be in hand, and nothing be said in the contract as to growing crops thereon, they will belong to the purchaser from the day fixed for completion (s).

(o) *Duke of Chandos* v. *Talbot* (1731), 2 P. Wms. 606; *Aubrey* v. *Fisher* (1809), 10 East, 446; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

(p) *Rabbett* v. *Raikes* (1803), Woodfall, Landlord and Tenant, 17th ed., 691; *Channon* v. *Patch* (1826), 5 B. & C. 897.

(q) *Crosse* v. *Lawrence* (1852), 9 Hare, 462.

(r) *Colegrave* v. *Dias Santos* (1823), 2 B. & C. 76; *Manning* v. *Bailey* (1848), 2 Exch. 46.

(s) Dart, Vendors and Purchasers, 7th ed., 289.

SECTION 2.

NON-DISCLOSURE.

Vendor must disclose Defects.—A contract for the sale of land is not strictly a contract *uberrimæ fidei* (*t*), and in one case (*u*) KAY, J., referred to the doctrine of *caveat emptor* as applying to the sale of land. On the other hand, the particulars should describe everything which it is material for the purchaser to know, "in order to judge of the *nature* or *value* of the property" (*x*). A distinction must, it is submitted, be drawn between defects relating to the *title* to the property and defects in the property itself.

Defects of Title.—Unless the contrary is expressed, an agreement to sell land will include the whole of the vendor's interest therein, and such interest will be deemed to be an estate in fee simple free from incumbrances. It is the duty of the vendor, if he has a defect on his title, to disclose all that is necessary to protect himself, and not the duty of the purchaser to make inquiry before entering into a contract, and this is so whether the sale be by public auction or private contract (*y*). The burden of making the disclosure is on the vendor. Thus, the vendor must disclose the existence of an easement affecting the property (*z*), or

(*t*) *Brownlie* v. *Campbell* (1880), 5 App. Cas., at p. 925.
(*u*) *Davenport* v. *Charsley* (1886), 54 L. T. 372.
(*x*) Dart, Vendors and Purchasers, 7th ed., 123.
(*y*) *Re White and Smith's Contract*, [1896] 1 Ch., at p. 637.
(*z*) *Heywood* v. *Mallalieu* (1883), 25 Ch. D. 357; *Ashburner* v.

a covenant restricting its user and enjoyment (*a*). It is not sufficient for the contract to refer to covenants contained in previous conveyances, unless those covenants are read out at the auction or a reasonable opportunity is afforded the purchaser of examining them before the sale (*b*). Again, it is the duty of the vendor to give notice of adverse claims which are not idle and frivolous (*c*), and the principle has been applied by JOYCE, J., to the non-disclosure of a party wall notice under the London Building Act, 1894, although a notice of this character does not strictly speaking affect the vendor's title (*d*). The court will not, however, refuse specific performance where the only blot on the title is a claim by some third party to rectify a deed if such third party take no steps to obtain rectification (*e*). Moreover, the maxim *cujus est solum ejus est usque ad coelum et ad inferos* applies. Consequently, if the vendor has no title to the mines under his property, or if a third party

Sewell, [1891] 3 Ch. 405; *Vowles* v. *Bristol Building Society* (1900), 44 Sol. J. 592. *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258.

(*a*) *Higgins and Hitchman's Contract* (1882), 21 Ch. D. 95; *Nottingham Patent Brick and Tile Co.* v. *Butler* (1886), 16 Q. B. D. 778; *Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23; *Re Cox and Neve's Contract*, [1891] 2 Ch. 109.

(*b*) *Dougherty* v. *Oates* (1900), 45 Sol. J. 119; *Childe* v. *Hodgson* (1906), 54 W. R. 234. A vendor may produce a deed to the purchaser and say, "There is this deed affecting the property, look at it for yourself"; and if the purchaser is given a reasonable opportunity of so doing he will be bound.

(*c*) *Re Harris and Rawling's Contract*, [1894] W. N. 19.

(*d*) *Carlish* v. *Salt*, [1906] 1 Ch. 335; but *cf. Re Leyland and Taylor*, [1900] 2 Ch. 625.

(*e*) *George* v. *Thomas* (1904), 52 W. R. 416; *Delaney and Deegan*, [1905] 1 I. R. 602.

has a *jus projiciendi* over his property, this must be disclosed (*f*).

Defects in Subject-Matter.—A *patent* defect in the subject-matter of the contract, *i.e.*, one which could be discovered by inspection, such, for instance, as the ruinous condition of freehold premises (*g*), or the existence of a public highway running through an estate (*h*), need not be pointed out by the vendor. With regard to the *latent* defects, those which cannot be discovered by any reasonable inspection, *e.g.*, the existence of a nuisance in the neighbourhood or an underground culvert for water, it has been suggested that if the defect is known to the vendor it ought to be disclosed (*i*), and this view was taken by JOYCE, J., in a recent case (*k*). On the other hand, it is stated in Story on Contracts, in a passage which has been cited with approval by COCKBURN, C.J., and Lord O'HAGAN, that the vendor "is not ordinarily bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive

(*f*) *Whittington* v. *Corder* (1852), 16 Jur. 1034; *Laybourn* v. *Gridley*, [1892] 2 Ch. 53; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412.

(*g*) *Grant* v. *Munt* (1815), Coop. G. 177, *aliter* as to leaseholds when there is a covenant to repair.

(*h*) *Oldfield* v. *Round* (1800), 5 Ves. 508; *Ashburner* v. *Sewell*, [1891] 3 Ch. at p. 405.

(*i*) *Per* WIGRAM, V.C., in *Lucas* v. *James* (1849), 7 Hare, at p. 410.

(*k*) *Carlish* v. *Salt*, [1906] 1 Ch. at p. 341. The dictum of BRAMWELL, B., cited by the learned judge in *Carlish* v. *Salt*, *supra*, only applies to the *maker* of an article in contra-distinction to the vendor of an article made by a third party. The other cases cited relate to defects of title and not of subject-matter. See also *Smith* v. *Baker* (1879), 40 L. T. 261; *Shepherd* v. *Croft*, [1911] 1 Ch. 521.

the purchaser." It may therefore be that in the absence of fraud or of misrepresentation, express or implied (*l*), the maxim *caveat emptor* should apply, and at any rate if the vendor is not aware of a latent defect at the date of the contract, the purchaser must take the estate with all its faults (*m*).

On the other hand, if there is any misdescription or misrepresentation by the vendor as to the defect, then, whether the defect is patent (*n*) or latent (*o*) and whether it is known to the vendor or not (*p*), the purchaser will be entitled either to compensation or rescission.

Leases and Tenancies.—If an estate be sold subject to a lease, this fact must be expressly stated in the particulars, otherwise the contract will be deemed to be for the sale of the property with *vacant possession*. Thus, where an estate, which was subject to leases for lives at a low rent, was described as "now or late in the occupation of Hugh Roberts," and the conditions provided that, on completion, the purchaser should be "let into the receipt of the rents and profits," making no mention of *possession*, it was nevertheless held that the purchaser could not be compelled to take the title without compensation (*q*).

(*l*) "The vendor ought to state that which, if it is not stated, makes that which he *does state* ambiguous or misleading" (*Re Marsh and Earl Granville* (1883), 24 Ch. D., at p. 15).

(*m*) *Re Puckett and Smith's Contract*, [1902] 2 Ch., at p. 261.

(*n*) *Grant* v. *Munt* (1815), Coop. G. 173.

(*o*) *Baker* v. *Moss* (1902), 66 J. P. 360.

(*p*) *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258; *Vowles* v. *Bristol Building Society* (1900), 44 Sol. J. 592.

(*q*) *Hughes* v. *Jones* (1861), 3 De G. F. J. 307; *Royal Bristol Permanent Building Society* v. *Bomash* (1887), 35 Ch. D. 390.

Nature of Tenancies.—Moreover, when the property is described as subject to tenancies, if there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, "if you had gone to the tenant and inquired, you would have found out all about it." Thus, to describe a public house as "now in the occupation of A. B." is misleading if the property is, in fact, subject to a lease to a brewer for eight years (*r*). On the other hand, if the property is described as "let to A. B., a yearly tenant, at £130 per annum," and A. B. has previously given notice to quit, this would be misdescription, since the purchaser would be led to suppose that he was purchasing with the benefit of *continuing* tenancies at fixed rents, whereas he would in fact have to find tenants immediately after the completion of his purchase (*s*). Again, to describe a farm as "*lately* in the occupation of A. B., at the annual rental of £290," would probably be held to be misleading if the vendor knew that nothing like that rent could now be obtained for it (*t*).

Any special rights conferred on tenants of the property and any extraordinary and onerous covenants to be performed by the reversioners should be disclosed. It would seem, however, that the purchaser cannot complain if the undisclosed rights of tenants are trifling in their character, and the purchaser might

(*r*) *Caballero* v. *Henty* (1874), L. R. 9 Ch. 447.

(*s*) *Dimmock* v. *Hallett* (1866), L. R. 2 Ch., at p. 21.

(*t*) *Ibid.*, at p. 27.

with a little exertion have discovered them (*u*). Thus, on the sale of a large property the non-disclosure of the fact that a yearly tenant of a small portion (about one-seventh) of the estate had given notice to quit was held to be immaterial (*x*).

Ordinary Incidents of Tenure.—Land tax and tithe rentcharge are burdens the existence of which is presumed (*y*). Consequently they need not be noticed in the contract, and a purchaser is bound to take the estate subject to these charges, unless, indeed, the contract states the land tax to have been redeemed, or that the property is free from tithe (*z*). On a sale of copyholds, the fines or customs of the manor need not be stated (*a*), and if it is clear from the contract that the land, though freehold, is held of a manor, it is not necessary to refer to quit rents or heriots to which it may be subject.

Unusual Covenants in Leases.—On the sale of leaseholds it is the duty of the vendor to disclose the existence of onerous and unusual covenants in the lease, or else to afford the purchaser a reasonable opportunity of examining the lease for himself. This duty of disclosure is not affected by the fact that the vendor's title is under the terms of the contract to be accepted by the purchaser (*b*). The question whether

(*u*) *Phillips* v. *Miller* (1874), L. R. 10 C. P. 427.

(*x*) *Davenport* v. *Charsley* (1886), 54 L. T. 372.

(*y*) Dart, Vendors and Purchasers, 7th ed., 393, 394; Williams, Vendor and Purchaser, 141.

(*z*) *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23.

(*a*) *White* v. *Cuddon* (1842), 8 Cl. & F. 766.

(*b*) *Re Haedicke and Lipski's Contract*, [1902] 2 Ch. 666.

a fair and reasonable opportunity of inspecting the lease has been given to the purchaser is one of fact depending on the particular circumstances of each case (c). When the lease contains the usual covenant to deliver up the premises in good repair at the end of the term, and any of the demised premises have been pulled down, the fact should be stated (d).

Other Property comprised in Lease.—With regard to leasehold property, it is always one of the most forcible objections to the title, that the premises bought are held *with others* under one and the same lease, at an entire rent and subject to entire covenants. Thus, where the property sold is held with other property at one entire rent (e) or where leasehold property which is sold in separate lots is held under one lease (f), it is incumbent on the vendor to state that fact in plain and distinct terms. The same rule applies to the case of the sale of an underlease of one of two houses comprised in an original lease common to both, and containing covenants by the lessee to repair, etc. (g).

Non-disclosure by Purchaser.—The purchaser is *not* bound to disclose any fact exclusively within his

(c) *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487.

(d) *Granger* v. *Worms* (1814), 4 Camp. 83.

(e) *Warren* v. *Richardson* (1830), 1 You. 1.

(f) *Sheard* v. *Venables* (1867), 36 L. J. Ch. 922. It is presumed the rule would apply even where one purchaser bought all the lots, since he might wish to resell them separately.

(g) *Re Lloyds Bank and Lillington*, [1912] 1 Ch. 601; *Darlington* v. *Hamilton* (1854), Kay, 540. The rule is not affected by s. 14 of the Conveyancing Act, 1881, or s. 4 of the Conveyancing Act, 1892; *cf.* *Cresswell* v. *Davidson* (1887), 56 L. T. 811.

knowledge which might reasonably be expected to influence the price of the subject to be sold, *e.g.*, the existence of a mine under the property (*h*); and no deceit can be implied from the mere silence of the purchaser (*i*). "Mere silence as regards a material fact which the one party is not under an obligation to disclose to the other, cannot be a ground for rescission or a defence to specific performance" (*k*). But a single word, or even a gesture, from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact which might influence the price of the subject to be sold, would be sufficient ground for a court of equity to refuse a decree for specific performance of the contract (*l*).

So *a fortiori* would a contrivance on the part of the purchaser who is better informed than the vendor of the real value of the property to be sold, to hurry the vendor into a contract without giving him the opportunity of being fully informed of its real value (*m*).

(*h*) See *Turner* v. *Harvey* (1821), Jac. 169; and see *Fox* v. *Mackreth* (1788), 2 Bro. C. C. 400.

(*i*) *Coaks* v. *Boswell* (1886), 11 App. Cas. 235, 236.

(*k*) *Turner* v. *Green*, [1895] 2 Ch. 205; *Seddon* v. *North Eastern Salt Co.*, [1905] 1 Ch., at p. 236.

(*l*) *Turner* v. *Harvey* (1821), Jac. 169; *Walters* v. *Morgan* (1860), 3 De G. F. J. 724; *Davis* v. *Ohrly* (1898), 14 T. L. R. 260.

(*m*) *Walters* v. *Morgan*, *supra*; and *cf.* *Scott* v. *Coulson*, [1903] 2 Ch. 453, where the contract was entered into upon the basis of a "common affirmative belief" which proved to be mistaken.

CHAPTER IV.

CONTRACTS BY AGENTS.

SECTION 1.

AUTHORITY OF THE AGENT.

Appointment of Agent.—We have seen that the requirements of the Statute of Frauds are satisfied if the contract is signed by the party to be charged or some other person thereunto by him lawfully authorised. The person authorised for this purpose may be appointed by parol (*a*), and if the agent is acting within the scope of his authority in signing a memorandum which complies with the statute, it is not necessary to prove that he was expressly authorised to sign it *as a record of the contract* (*b*). An agent, however, cannot bind the principal further than the authority given him will extend.

Scope of Authority.—Thus it is not within the scope of a solicitor's business to act as agent for the sale of his client's property, and consequently a memorandum signed by a solicitor does not bind his client

(*a*) *Emmerson* v. *Heelis* (1809), 2 Taun. 47; Fry, Specific Performance, 248. One party to a contract cannot sign as agent of the other (*Wright* v. *Dannah* (1809), 2 Camp. 203).

(*b*) *John Griffiths Cycle Co.* v. *Humber & Co.*, [1899] 2 Q. B. 414.

in the absence of evidence of express authority (*c*). Again, where instructions are given to an estate agent to "find a purchaser" of property, he is not authorised to sign a contract on behalf of the vendor (*d*). So, too, where an agent is authorised by the vendor to receive applications to "treat and view" (*e*), or is employed "in and about the purchase" of certain property (*f*), he can only enter into negotiations and receive proposals, and cannot make a binding contract. But where an estate agent was authorised "to sell" certain houses, it was held that this gave him authority to sign a contract on behalf of his principal (*g*).

Auctioneer.—In the case of sales by auction, the auctioneer is the agent both of the vendor and the purchaser, and has authority to sign the contract on behalf of the highest bidder (*h*). The signature of the auctioneer *as witness* of the purchaser's execution has been held to bind the vendor (*i*). The auctioneer's clerk, however, has no authority by the general custom (*k*) although there may be special circum-

(*c*) *Smith* v. *Webster* (1876), 3 Ch. D. 49; *Bowen* v. *Duc d'Orléans* (1900), 16 T. L. R. 226; but cf. *Daniels* v. *Trefusis*, [1914] 1 Ch. 788.

(*d*) *Hamer* v. *Sharp* (1874), L. R. 19 Eq. 113; *Chadburn* v. *Moore* (1892), 61 L. J. Ch. 674; *Thuman* v. *Best*, [1907] W. N. 170.

(*e*) *Godwin* v. *Brind* (1868), L. R. 5 C. P. 299 n.

(*f*) *Vale of Neath Colliery* v. *Furness* (1876), 45 L. J. Ch. 276.

(*g*) *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267.

(*h*) *Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210.

(*i*) *Wallace* v. *Roe*, [1903] 1 I. R. 32.

(*k*) *Bell* v. *Balls*, [1897] 1 Ch. 663.

stances to show that he had such authority (*l*). Moreover, the auctioneer's memorandum, in order to bind the purchaser, must be a contemporary memorandum, *i.e.*, "one made at the time and as part of the transaction of sale" (*m*).

SECTION 2.

CONTRACTS BY UNAUTHORISED AGENTS.

Warranty of Authority.—If a person professing to act as agent enters into a contract without the authority of his principal, the other contracting party can sue the agent upon his implied warranty of authority (*n*).

Ratification.—A contract entered into by a person professedly acting as an agent who is not authorised to contract, may be subsequently ratified by the principal, and the maxim applies *omnis ratihabitio retrotrahitur et mandato priori acquiparatur*. Thus, where an offer is accepted by an unauthorised agent, whose acceptance is subsequently ratified, a revocation of the offer which is made after the date of acceptance, but prior to the ratification, is inoperative (*o*). The rule as to ratification is, of course, subject to some exceptions, and does not apply to the case of an option

(*l*) *Bird* v. *Boulter* (1833), 4 B. & Ad. 443; *Sims* v. *Landray*, [1894] 2 Ch. 318.

(*m*) *Bell* v. *Balls*, [1897] 1 Ch., at p. 672.

(*n*) *Collen* v. *Wright* (1857), 8 El. & Bl. 647. If the authority of the agent is denied, he can be made co-defendant in the action under an alternative claim, see *Bennetts & Co.* v. *McIlwraith & Co.*, [1896] 2 Q. B. 464.

(*o*) *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295.

of purchase where there is a time limited within which the option must be exercised (*p*); nor to a case where the unauthorised agent does not professedly contract as agent (*q*).

SECTION 3.

MISREPRESENTATION BY AGENTS.

Misdescription of Property.—A contract for the sale of land may be vitiated by misrepresentations made by the agent, although the misrepresentations are made without the knowledge or approval of the principal. Thus an agent employed to find a purchaser; has implied authority to describe the property and represent its value (*r*), and the nature of restrictive covenants affecting its user (*s*), and if the agent makes a misrepresentation of fact, the principal cannot enforce the contract.

Misrepresentation of Parties.—Again, if the agent of A. expressly states to B., the other contracting party, that A. is not his principal, this is a misrepresentation which may prevent A. from enforcing the contract if B. has reasons for not wishing to enter into a contract with A. (*t*).

But if, as is the general rule, the consideration of the person with whom B. thought he was contracting did not enter at all into the contract, and he would

(*p*) *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348.
(*q*) *Keighley, Maxstead & Co.* v. *Durrant*, [1901] A. C. 240.
(*r*) *Mullens* v. *Miller* (1882), 22 Ch. D. 194.
(*s*) *Wauton* v. *Coppard*, [1899] 1 Ch. 92.
(*t*) *Archer* v. *Stone* (1898), 78 L. T. 34.

have been equally willing to sell to any other person at the same price, a misrepresentation by the agent as to the principal with whom B. is contracting is not material (*u*).

SECTION 4.

AGENT'S COMMISSION.

When Commission Earned.—Before concluding the subject of contracts for the sale of land entered into by agents, it may be convenient to say a few words about the commission of the vendor's agent. As a general rule the agent earns his commission as soon as a binding contract has been entered into, and notwithstanding the fact that the contract is subsequently rescinded by mutual agreement between vendor and purchaser (*x*). Moreover, the agent is entitled to his commission if the sale is brought about in consequence of his introduction (*y*), although the ultimate bargain is not actually made by him (*z*). If two agents claim commission in respect of the same sale the vendor is not entitled to relief by way of interpleader (*a*).

But if through no default of the vendor a final agreement has not been arrived at between the parties,

(*u*) *Nash* v. *Dix* (1898), 78 L. T. 445.

(*x*) *Horford* v. *Wilson* (1807), 1 Taunt. 12 (where the vendor returned the deposit).

(*y*) The introduction must be an efficient cause in bringing about the sale (*Miller* v. *Radford* (1903), 19 T. L. R. 576).

(*z*) *Green* v. *Bartlett* (1863), 14 C. B. (N.S.) 681; *Ex parte Durrant* (1888), 5 Mor. 37.

(*a*) *Greatorex* v. *Shackle*, [1895] 2 Q. B. 249.

the agent cannot claim his commission (*b*), and it is presumed that the same result would follow if, through the agent's negligence, the contract, although final, is not evidenced in writing in accordance with the Statute of Frauds so as to be enforceable against the purchaser (*c*).

Secret Commission.—If the vendor's agent receives a secret commission from the purchaser, he must not only account for the same to the vendor, but forfeits his right to commission from his principal (*d*).

If the vendor pays a secret commission to the agent of the purchaser, the purchaser may deduct the amount of such commission from the purchase-money without rescinding the contract (*e*). The right of the purchaser to rescind when his agent has received a commission from the vendor depends on whether the agent has an interest in conflict with his duty (*f*).

By the Prevention of Corruption Act, 1906 (*g*), the act of giving or accepting secret commissions, if done corruptly, is made a statutory misdemeanor.

(*b*) *Grogan* v. *Smith* (1891), 7 T. L. R. 132; *cf. Passingham* v. *King* (1898), 14 T. L. R. 39.

(*c*) *Cf. Denew* v. *Daverell* (1813), 3 Camp. 451 (where the action was on a *quantum meruit*, and not on a special contract for a stipulated sum).

(*d*) *Andrews* v. *Ramsey*, [1903] 2 K. B. 635.

(*e*) *Grant* v. *Gold Exploration and Development Syndicate, Limited*, [1900] 1 Q. B. 233.

(*f*) *Rowland* v. *Chapman*, [1901] W. N. 153.

(*g*) 6 Edw. 7, c. 34.

PART II.

CAPACITY OF VENDOR AND PURCHASER.

CHAPTER V.

PERSONS UNDER DISABILITY.

SECTION 1.

INFANTS.

Disability of Infant.—An infant cannot enter into a binding contract for the sale or purchase of land, nor can he sue for the specific performance of such a contract during his infancy (*a*); but on attaining his majority he may repudiate or confirm it, his representatives having the like privilege should he die under age (*b*).

If an infant pays money on a valuable consideration and partially enjoys that consideration, he cannot recover back the money from the outlay of which he has derived an advantage. It may therefore be that if an infant contracts for purchase of an estate and

(*a*) *Flight* v. *Bolland* (1828), 4 Russ. 298.

(*b*) *Clayton* v. *Ashdown* (1714), 9 Vin. Abr. 393. The Infants Relief Act, 1874 (37 & 38 Vict. c. 62), seems not to affect this. See *Duncan* v. *Dixon* (1890), 44 Ch. D. 211; *Edwards* v. *Carter*, [1893] A. C. 360.

pays a deposit, and *after going into possession* of the property refuses to complete the purchase, he cannot recover the deposit unless fraud was practised in procuring it from him (*c*).

In a case where an infant borrowed money for the purpose of purchasing land, it was held that the lenders were subrogated to the vendor of the land, and had a lien on the property for the amount of the purchase money advanced by them (*d*).

As a rule a conveyance or assignment of property by an infant is also voidable in the same sense as a contract, namely that he may repudiate it on attaining his majority, though if it is not repudiated within a reasonable time after attaining majority he is bound by it. But by the custom of gavelkind, a tenant of an estate of freehold may, at the age of fifteen, sell and make a binding conveyance of his estate by feoffment (*e*).

An infant may also exercise by deed a power of appointment over property at any rate if it be a power simply collateral (*f*).

Sales of Infant's Property under Statutory Powers.—By various statutes an infant is enabled to

(*c*) *Ex parte Taylor* (1856), 8 De G. M. & G. 254. See also Sugden, Vendors and Purchasers, 209. See, however, *Hamilton* v. *Vaughan Sherrin Electrical, &c. Co.*, [1894] 3 Ch. 589; Williams, Vendor and Purchaser, Vol. II., 801.

(*d*) *Nottingham Permanent Benefit Building Society* v. *Thurstan*, [1903] A. C. 6.

(*e*) 2 Bl. 84; but *cf. Re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525.

(*f*) *Hearle* v. *Greenbank* (1749), 3 Atk. 695; *Re D'Angibau* (1880), 15 Ch. D. 228; Williams, Vendor and Purchaser, Vol. II.,

sell land for special purposes, such as religion, charity, instruction, literature, science, and the fine arts, or works of a public nature (*g*).

A sale of land belonging to an infant may also now be made on his behalf under the provisions of the Settled Estates Act, 1877 (*h*), the Conveyancing Act, 1881 (*i*), and the Settled Land Act, 1882 (*j*).

By s. 16 of the Settled Estates Act, the court is empowered to authorise a sale of the whole or any part of the settled estates, or any timber (not being ornamental timber) growing on any settled estates subject to the restrictions contained in the Act.

By s. 41 of the Conveyancing Act, 1881, it is enacted that "where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877." The words "seised of or entitled to land for an estate in fee simple," include the case of an infant who is only *contingently entitled* (*k*). Thus, where an infant is entitled to land in the event of his attaining twenty-seven, and it is desired to sell the estate on his behalf, the proper course is for the infant to petition the court by his next friend; for it has been held that the powers given by the Settled

789, 790. Apparently he cannot exercise any power if to do so would operate to diminish his interest in the property appointed. *Ibid.*

(*g*) See Dart, Vendors and Purchasers, 7th ed., 3.

(*h*) 40 & 41 Vict. c. 18.

(*i*) 44 & 45 Vict. c. 41.

(*j*) 45 & 46 Vict. c. 38.

(*k*) *Liddell* v. *Liddell* (1882), 52 L. J. Ch. 207; *Re Sparrow's Settled Estate*, [1892] 1 Ch. 412.

Land Act, 1882, cannot be exercised where an infant is only contingently entitled unless the case falls within s. 63 of that statute (*l*).

In every other case, the sale of an infant's land can be made more cheaply and expeditiously under the provisions of the Settled Land Act, 1882. The power of sale conferred on tenants for life by that Act (*m*) may be exercised on behalf of infants in the following cases: where an infant is in his own right seised of or entitled *in possession* to land (*n*); secondly, where an infant is tenant for life, or would, if he were of full age, be a tenant for life (*o*); and thirdly, where an infant has the powers of a tenant for life (*p*), or would, if he were of full age, have those powers. The persons o exercise the power of sale on behalf of an infant are either the trustees of the settlement or, if there are none, then "such persons and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular case, orders" (*q*).

SECTION 2.

MARRIED WOMEN.

Disability of Married Woman.—Married women, with regard to their capacity to sell land, may conveniently be treated under two heads, viz.:

(*l*) *Re Horne's Settled Estate* (1888), 39 Ch. D. 84.
(*m*) Settled Land Act, 1882, s. 3.
(*n*) *Ibid.*, s. 60.
(*o*) *Ibid.*, s. 59.
(*p*) *Ibid.*, s. 58.
(*q*) *Ibid.*, s. 60. For form of summons, see Wolstenholme, 7th ed. 417.

I. Women married before January 1st, 1883 (when the Married Women's Property Act, 1882, came into operation), whose title to the property, whether vested or contingent, and whether in possession, reversion, or remainder, accrued prior to that date.

II. Women married since January 1st, 1883, or who, though married before January 1st, 1883, did not acquire a title until after that date (*r*).

CLASS 1.—WOMEN MARRIED BEFORE JANUARY 1ST, 1883.

Modification of Common Law by Equity.—In dealing with married women who fall within Class 1, it is necessary to consider the doctrine of Separate Use originally established by Courts of Equity.

The effect of this doctrine was to put a married woman in almost every respect into the position of a *feme sole* with regard to property limited to her separate use by deed or will (*s*). Superimposed on this doctrine of Separate Use was a further doctrine of equity, devised by Lord THURLOW, at the end of the 18th century, which enabled a testator or grantor to impose a fetter on the power of disposition *inter vivos* conferred by the separate use (*t*). This fetter is known as Restraint on Anticipation.

It is therefore necessary to subdivide Class 1 into—

(*r*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 5. And see *Reid* v. *Reid* (1886), 31 Ch. D. 402.

(*s*) See *Taylor* v. *Meads* (1865), 4 De G. J. S. 597.

(*t*) *Cf. Stogdon* v. *Lee*, [1891] 1 Q. B. 661.

(1) Married women whose property is *not* limited to their separate use.

(2) Married women whose property is limited to their separate use.

(3) Married women whose property is limited to their separate use, but with restraint on anticipation.

Where no Separate Use.—Real estate of freehold tenure, whether it be an estate in equity or at law, to which a married woman is not entitled for her separate use, can only be disposed of by her with the concurrence of her husband and by a deed acknowledged under the Fines and Recoveries Act (*u*). The court (*v*) has power under s. 91 of that Act to dispense with the concurrence of the husband in certain cases. The Act makes elaborate provisions (*w*) as to the manner in which an acknowledgment is to be made and before whom it is to be taken, and the Conveyancing Act, 1882 (*x*), renders one commissioner only requisite for taking the acknowledgment, and provides that such acknowledgment shall not be impeachable by reason only that the judge or commissioner taking the same is interested.

A married woman's *legal* estate in copyholds cannot be surrendered without her husband's consent and without her separate examination either by the

(*u*) 3 & 4 Will. 4, c. 74, s. 77. See also Settled Land Act, 1882, s. 61 (3).

(*v*) The application should be made in the King's Bench Division; *Re Ellen Giles* (1894), 70 L. T. 757.

(*w*) Ss. 79—89.

(*x*) 45 & 46 Vict. c. 39, s. 7.

steward or, under special custom, by two stewards (*y*). The *equitable* interest of a married woman in copyholds can be assigned by her by deed acknowledged with her husband's concurrence (*z*), or may be surrendered in the same manner as a legal estate (*a*). It has been held, however, that a married woman who is tenant on the rolls can declare herself a trustee by deed acknowledged under s. 77 of the Fines and Recoveries Act, so as to effectually bind the estate against her heir (*b*).

A husband may dispose of a term of years belonging to his wife, which is not subject to the Married Women's Property Act, 1882, or settled to her separate use, either absolutely or by way of mortgage (*c*); but, if he does not exercise such power, it will pass upon the death of either husband or wife to the survivor without the necessity of taking out administration (*d*). The power of the husband extends to reversionary and contingent interests (*e*), unless the interest is such that it cannot vest in the wife during coverture in possession (*f*). If the interest is equitable, the wife must concur in and

(*y*) Elton, Copyholds, 56.

(*z*) Fines and Recoveries Act, 1833, s. 77.

(*a*) *Ibid.*, s. 90.

(*b*) *Carter* v. *Carter*, [1896] 1 Ch. 62.

(*c*) *Hill* v. *Edmonds* (1852), 5 De G. & Sm. 603, 607.

(*d*) *Re Bellamy* (1883), 25 Ch. D. 620. This right of survivorship also exists where leaseholds belong to the wife's separate estate, provided that she die intestate (*Surman* v. *Wharton*, [1891] 1 Q. B. 491).

(*e*) *Donne* v. *Hart* (1831), 2 Russ. & M. 360.

(*f*) *Duberley* v. *Day* (1852), 16 Beav. 33.

acknowledge the deed disposing thereof, in order to bar her equity to a settlement (*g*).

Equitable Separate Use.—When property is settled on a married woman for her separate use she is freed to a great extent from the disability of coverture, and can convey any equitable interest as if she were unmarried. It has, however, been held that even when the fee simple in land is vested in a married woman for her separate use, she can only convey the *legal estate* by deed acknowledged with the concurrence of her husband (*h*), unless she has *power* to appoint the fee (*i*). It would seem, moreover, that if a married woman is tenant in tail, even in the case of an *equitable* estate tail limited to her separate use, she can only bar the entail by deed acknowledged, and that her husband's concurrence is necessary (*k*). A reversionary interest may be settled to the separate use of a married woman (*l*); and although doubts have been expressed whether a *contingent* reversionary interest can be settled to a separate use, the better opinion is that it can be so limited. Freehold and copyhold property which descends to a woman married after August 9th, 1870, as heiress of an intestate is

(*g*) *Hanson* v. *Keating* (1844), 4 Hare, 1.

(*h*) *Lechmere* v. *Brotheridge* (1863), 32 Beav. 368; *sed quære*, see *Pride* v. *Bubb* (1871), L. R. 7 Ch. 64.

(*i*) A power of appointment could always be exercised by a married woman without the concurrence of her husband, and such a power may co-exist with the fee. See Farwell, Powers, 38, 116.

(*k*) *Cooper* v. *Macdonald* (1877), 7 Ch. D. at p. 288; Fines and Recoveries Act, 1833, s. 40.

(*l*) *King* v. *Lucas* (1883), 23 Ch. D. 723; *Sturgis* v. *Corp* (1806), 13 Ves. 190.

held by her to her separate use (*m*) although apparently such separate use is limited to her life (*n*).

A married woman who has obtained a judicial separation or a protection order under the Matrimonial Causes Act, 1857, is in the position of a *feme sole* as to all property to which she becomes entitled in possession after the date of the decree or (in the case of a protection order) of the husband's desertion; but with regard to property to which she was entitled *in possession* at the date of the decree for separation or the desertion (as the case may be), she remains in the position of a married woman (*o*).

Restraint on Anticipation.—A restraint on anticipation could only be imposed on property which was limited to a married woman for her separate use (*p*), but no particular form of words was necessary, provided that the intention was sufficiently clear. The restraint, unless expressly confined to a particular coverture, will operate on all the covertures of a woman, but she can destroy it while she is discovert (*q*). A clause restraining anticipation may apply to a gift of capital or the fee simple of real estate, as well as to a gift of income (*r*).

(*m*) Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 8.

(*n*) *Johnson* v. *Johnson* (1887), 35 Ch. D. 345.

(*o*) *Hill* v. *Cooper*, [1893] 2 Q. B. 85; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 21, 25; Matrimonial Causes Act, 1858 (21 & 22 Vict. c. 108), ss. 7—9.

(*p*) *Stogdon* v. *Lee*, [1891] 1 Q. B. 661.

(*q*) *Re Gaffee* (1849), 1 Macn. & G. 545.

(*r*) *Re Grey's Settlements* (1887), 34 Ch. D. 712; *Bates* v *Kesterton*, [1896] 1 Ch. 163.

A married woman can bar an estate tail, although she is restrained from anticipation (*s*). Where a married woman is a tenant for life under the Settled Land Acts, and is entitled for her separate use, she can exercise the powers of a tenant for life notwithstanding a restraint on anticipation (*t*). Where, however, there is a separate use with restraint on anticipation affixed to the *fee simple* of property to which a married woman is entitled, she is not a tenant for life for the purposes of the Settled Land Acts; for the estate, by the curtesy which her husband takes in the event of her dying intestate, is by virtue of the general law and not under a settlement (*u*).

If a married woman who is restrained from anticipation, and is not a tenant for life, desires to sell her property, an application must be made to the court by originating summons. The court has power under s. 7 of the Conveyancing Act, 1911, to make an order binding the property.

CLASS 2.—WOMEN MARRIED AFTER JANUARY 1ST, 1883, OR WHO THOUGH MARRIED BEFORE JANUARY 1ST, 1883, DID NOT ACQUIRE A TITLE UNTIL AFTER THAT DATE.

Statutory Separate Use.—As a consequence of the provisions of the Married Women's Property Act, 1882, a woman who comes within the second of the two classes into which we have divided married women, can sell and convey property to which she is entitled

(*s*) *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288.
(*t*) Settled Land Act, 1882, s. 61 (2), (6).
(*u*) *Bates* v. *Kesterton*, [1896] 1 Ch. 159.

in the same manner as if she were a *feme sole*, unless she is restrained from anticipation (*x*).

There was one exception to this prior to January 1st, 1908, a married woman who held real property *as trustee* having no power to convey except by deed acknowledged with the concurrence of her husband under the Fines and Recoveries Act (*y*), unless she was simply a *bare* trustee of freehold or copyhold land (*z*).

Now, by s. 1 of the Married Women's Property Act, 1907 (*a*), "a married woman is able, without her husband, to dispose of, or join in disposing of, real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a feme sole."

The validity of a restraint on anticipation is preserved by the Married Women's Property Acts, and such a restraint may now be imposed, although the property is not expressly limited to the separate use of a married woman (*b*).

(*x*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 2, 5, 19.

(*y*) *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358.

(*z*) Trustee Act, 1893, s. 16; *Re Howgate and Osborne's Contract*, [1902] 1 Ch. 451. A married woman mortgagee who was not a trustee could transfer the mortgage security (*Re West and Hardy's Contract*, [1904] 1 Ch. 145), or convey to a purchaser from the mortgagor (*Re Brook and Fremlin's Contract*, [1898] 1 Ch. 647), without the concurrence of her husband; and it is presumed that she could likewise convey in exercise of her power of sale as mortgagee.

(*a*) 7 Edw. 7, c. 18. The Act is to a certain extent retrospective. See s. 1 (2).

(*b*) *Re Lumley*, [1896] 2 Ch. 690.

MARRIED WOMEN AS PURCHASERS.

Effect of Contract by Married Woman.—Prior to December 5th, 1893, a contract by a married woman could not be enforced unless *at the time it was entered into* she was possessed of separate estate which she was not restrained from anticipating, whether created by express limitation or by the provisions of the Married Women's Property Acts (*c*).

Now, however, by s. 1 of the Married Women's Property Act, 1893 (*d*), it is enacted that every contract entered into by a married woman (otherwise than as agent) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to: provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter (*e*) she is restrained from anticipating.

(*c*) *Palliser* v. *Gurney* (1887), 19 Q. B. D. 519.

(*d*) 56 & 57 Vict. c. 63.

(*e*) This proviso has been held to prevent a judgment creditor from enforcing his judgment, after the married woman has become discovert, against property which at the time of the contract she was restrained from anticipating. See *Barnett* v. *Howard*, [1900] 2 Q. B. 784; *Brown* v. *Dimbleby*, [1904] 1 K. B. 28.

SECTION 3.

LUNATICS.

When Contracts, etc., by Lunatics voidable.—A contract entered into or conveyance made by a lunatic is voidable, if the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about, the onus of proving such knowledge being on the lunatic or person deriving title under him. But if the other party acted bonâ fide, and had no notice of the insanity, he can enforce the contract whether it be executed or executory (*f*).

All contracts or conveyances by a lunatic during a lucid interval are binding (*g*), except in the case of a lunatic so found by inquisition (*h*). Upon the same principle it has been held that "dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding" (*i*).

(*f*) *Molton* v. *Camroux* (1849), 4 Ex. 17; *Imperial Loan Co., Limited* v. *Stone*, [1892] 1 Q. B. 599. But it seems doubtful whether a Court of Equity would grant specific performance. See *Frost* v. *Beavan* (1853), 22 L. J. Ch. 638; *Leaver* v. *Torres* (1899), 43 Sol. J. 778; *Baldwyn* v. *Smith*, [1900] 1 Ch., at p. 590.

(*g*) *Beverley's Case* (1602), 4 Co. Rep. 123 b; *Hall* v. *Warren* (1804), 9 Ves. 610.

(*h*) *Re Walker*, [1905] 1 Ch. 160.

(*i*) *Elliot* v. *Ince* (1857), 7 De G. M. & G. 488; *Price* v. *Berrington* (1851), 3 Man. & G. 498; *Sergeson* v. *Sealey* (1742), 2 Atk. 412.

It seems, however, that a voluntary conveyance by a lunatic is in any case void (*k*).

Powers of Committee of Lunatic.—When a lunatic is so found by inquisition a committee of his estate is appointed who has various powers of dealing with his property. Lunatics not so found by inquisition, inasmuch as they had no committees, were formerly outside the jurisdiction of the Court of Lunacy. Such persons are, however, now provided for by s. 116 of the Lunacy Act, 1890, which specifies five classes of lunatics not so found by inquisition, with regard to whom the powers of a committee may be exercised by such person, in such manner, and with or without security, as the judge may direct (*l*).

The court has power under the Lunacy Act, 1890 (*m*), to authorise the sale of property belonging (*n*) to the lunatic by his committee or the person appointed under s. 116; but this authority will not be given unless there are circumstances which render it desirable that the land should be sold. The proper course is for the committee to enter into a provisional agreement which is presented to the master for approval, and confirmed by the Lords Justices sitting as judges in lunacy (*o*). The conveyance is settled by the master, and executed by the committee under

(*k*) *Elliot* v. *Ince* (1857), 7 De G. M. & G. 487; Williams, Vendor and Purchaser, Vol. II., 801.

(*l*) 53 & 54 Vict. c. 5, s. 116 (1), (2).

(*m*) *Ibid.*, s. 120 (a); and see also s. 117.

(*n*) This does not include property of which the lunatic is tenant for life (*Re Salt*, [1896] 1 Ch. 120).

(*o*) Pope, Lunacy, 187.

s. 124 of the Act. Where a lunatic has a power of sale, or a power to consent to a sale, the court has jurisdiction under ss. 120 and 128 of the Act to authorise the committee or person appointed under s. 116 to exercise the power or give the necessary consent (*p*).

There was until lately a distinction between the jurisdiction of the Court of Lunacy in respect to a committee and its jurisdiction in respect to a person appointed under s. 116. Thus the committee of a lunatic so found can, under an order of the Court made by virtue of its original jurisdiction elect on behalf of a lunatic (*q*), or bar an entail when the lunatic is tenant in tail in possession (*r*). Again, the committee of a lunatic so found may, by virtue of s. 62 of the Settled Land Act, 1882, exercise the powers of a tenant for life under the Settled Land Acts. But formerly none of these acts could be performed by a quasi-committee appointed under s. 116 (*s*). Now, however, it is provided by s. 1 of the Lunacy Act, 1908, that in the case of any of the persons mentioned in sub-s. (1) of s. 116 of the Lunacy Act, 1890, not being a lunatic so found by inquisition, any powers which, if such person were a lunatic so found by inquisition, could be exercised by the committee of the estate may be exercised by such person in such manner as the judge in lunacy, or, subject to the rules in lunacy, a master may direct.

(*p*) *Re X.*, [1894] 2 Ch. 415, *sed quære.*

(*q*) *Re Earl of Sefton*, [1898] 2 Ch. 378.

(*r*) *Re Pares* (1879), 12 Ch. D. 333.

(*s*) *Re Baggs*, [1894] 2 Ch. 416 n.; *Re S. S. B.*, [1906] 1 Ch. 712; *Re De Moleyns' and Harris' Contract*, [1908] 1 Ch. 110.

The court has jurisdiction to authorise the sale of a lunatic's property in consideration of a perpetual rent-charge (*t*), and may also empower the committee to enter into the ordinary covenants for title (*u*).

SECTION 4.

CORPORATIONS.

Disability of Corporations to hold Land.—Corporations cannot hold land unless they are authorised by Act of Parliament, or they have obtained licence from the Crown for that purpose (*x*). A company registered under the Companies Acts has, however, power to hold lands (*y*). No company, however, formed for the purpose of promoting art, science, religion or charity, or any other like object not involving the acquisition of gain by the company or by the individual members thereof can without the sanction of the Board of Trade, hold more than two acres of land, but the Board of Trade may, by licence under the hand of one of their principal or assistant secretaries, empower any such company to hold lands in any such quantity, and subject to such conditions, as they think fit (*z*).

Purchases by associations of individuals who are unincorporated must be made by them in their private capacities and individual names. The inhabitants of a place, or the parishioners or churchwardens of a parish, or the commoners of a waste cannot

(*t*) *Re Ware*, [1892] 1 Ch. 344.

(*u*) *Re Ray*, [1896] 1 Ch. 468.

(*x*) Co. Lit. 92 a, 2 b; and see Mortmain and Charitable Uses Act (51 & 52 Vict. c. 42), ss. 1, 2.

(*y*) Companies (Consolidation) Act, 1908, s. 16.

(*z*) *Ibid.*, s. 19.

eo nomine purchase land (*a*). A parson is a corporation sole, and may hold land as such for the use and benefit of the church, but churchwardens are not a corporation for the purpose of holding land (*b*). However, by the custom of London and some other places the parson and the churchwardens are a corporation to purchase land (*c*). Land may also be held by the churchwardens *jointly* with the overseers of a parish for the purposes of poor relief (*d*), and the minister and churchwardens of any parish (such minister being the rector, vicar or perpetual curate thereof) are a corporation aggregate for the purposes of the School Sites Act (*e*).

Statutory Powers of Corporations to hold Land.—The following bodies have statutory powers to acquire or purchase land, viz.:

County councils for the purpose of any of their powers and duties (*f*), and for the purpose of providing small holdings and allotments (*g*).

Urban district councils and *county boroughs* acting as urban sanitary authorities for the purposes of the Public Health Acts (*h*).

(*a*) Co. Lit. 3 a.

(*b*) *Att.-Gen.* v. *Ruper* (1722), 2 P. Wms. 125.

(*c*) *Warner's Case* (1619), Cro. Jac. 532.

(*d*) Poor Relief Act, 1819 (59 Geo. 3, c. 12), s. 17.

(*e*) School Sites Act, 1844 (7 & 8 Vict. c. 37), s. 4.

(*f*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 65, 79.

(*g*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 7 (1).

(*h*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21 (1); Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 7, 175,

Rural district councils for the purposes of their powers and duties as rural sanitary authorities and highway boards (*i*).

Metropolitan borough councils (formerly metropolitan vestries and district boards) for the purposes of the Metropolitan Management Acts (*k*).

Municipal corporations (up to five acres) for the purpose of municipal buildings, or with the sanction of the Local Government Board for other purposes approved by the Board (*l*).

Parish councils for the purpose of public offices, recreation grounds, and public walks (*m*).

Local education authorities (now substituted for school boards) for the purpose of providing sufficient school accommodation for their district (*n*).

Guardians of the poor subject to the sanction of the Local Government Board for the purpose of workhouse accommodation (*o*).

County or borough councils may purchase land at the request of a volunteer corps, and hold it on behalf

(*i*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 24 (7); s. 25 (1); and see also Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175; Highway Boards Act, 1862 (25 & 26 Vict. c. 61), s. 9.

(*k*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 42; London Government Act, 1899 (62 & 63 Vict. c. 14), s. 34.

(*l*) Municipal Corporation Act, 1882 (45 & 46 Vict. c. 50), ss. 105, 107.

(*m*) Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 3 (9), 8 (1).

(*n*) Elementary Education Act, 1870 (33 & 34 Vict. c. 75), ss. 19–21; and see Education Act, 1902 (2 Edw. 7, c. 42).

(*o*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), ss. 1, 3, 6.

of a volunteer corps for military purposes (*p*); and any corporate body may acquire and hold land for the purposes of the Technical and Industrial Institutions Act (*q*).

The Postmaster-General is a corporation sole with power to hold land, and can sell or exchange with the consent of the Treasury Commissioners. A purchaser is not bound or entitled to inquire whether the consent of the Treasury has been given to such dealing (*r*).

Sales by Corporations.—In many cases restrictions have been imposed by statute on the alienation of their land by corporations. For example, in the case of a sale of land by a local education authority, the consent of the Education Department is necessary (*s*); while the sanction of the Local Government Board must be obtained to a sale of land by a county council (*t*), municipal corporation (*u*), London borough council (*x*), parish council (*y*), or poor law guardians (*z*).

(*p*) Military Lands Act, 1892 (55 & 56 Vict. c. 53), s. 1 (3). As to the construction of this Act, see *Hill* v. *Haire*, [1899] I. R., 1 Ch. 87.

(*q*) Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), s. 10 (2).

(*r*) Post Office Duties Act, 1840 (3 & 4 Vict. c. 96), s. 67; Post Office Lands Act, 1863 (26 & 27 Vict. c. 43), s. 1; Post Office Act, 1891 (54 & 55 Vict. c. 46), s. 6.

(*s*) Education Act, 1870 (33 & 34 Vict. c. 75), s. 22.

(*t*) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 64.

(*u*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 108; and see *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. 208.

(*x*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6 (5).

(*y*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8 (2).

(*z*) Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69), ss. 3, 6; and *cf.* Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 6 (1) (d).

London borough councils are absolutely prohibited from alienating recreation grounds and other open spaces dedicated to the use of the public (*a*). Ecclesiastical corporations, with certain exceptions, have power to sell their estates or endowments with the consent of the patron of the benefice, and with the consent of the Ecclesiastical Commissioners, to be testified by deed under their common seal, and after three months' notice to the bishop of the diocese (*b*). Ecclesiastical corporations, with the exception of colleges and hospitals, have also power, with the approval of the *Church Estate Commissioners*, to sell the reversions in church lands to their lessees (*c*).

Sales of glebe lands may now be made, with the approval of the Board of Agriculture, under the Glebe Lands Act, 1888 (*d*).

By the common law a consecrated church can never be used as a habitation for man, and the Church Building Act, 1869 (*e*), makes provision for the preservation of the sites of churches which have been pulled down under a faculty granted by the bishop.

In the case of a company registered under the Companies Acts, its power to sell its land depends on whether its memorandum of association authorises a sale. An ordinary trading company may, however,

(*a*) London Government Act, 1899 (62 & 63 Vict. c. 14), s. 32.

(*b*) Ecclesiastical Corporations Act, 1858 (21 & 22 Vict. c. 57).

(*c*) Ecclesiastical Corporations Act, 1851 (14 & 15 Vict. c. 104), ss. 1, 11; Ecclesiastical Corporations Act, 1861 (24 & 25 Vict. c. 105), s. 3; Ecclesiastical Corporations Act, 1862 (25 & 26 Vict. c. 52), s. 2.

(*d*) 51 & 52 Vict. c. 20. For rules under this Act, see [1897] W. N., p. 117.

(*e*) 32 & 33 Vict. c. 94, s. 8.

have an implied power to sell land belonging to it, although no express power to sell is conferred by its memorandum of association (*f*).

Contracts by Corporations.—At common law a contract by a corporation for the sale or purchase of land must be under the seal of the corporation or signed on behalf of the corporation by an agent authorised under seal. But a contract not under seal may subsequently be ratified by the corporation under seal, unless the other party has previously repudiated the contract (*g*).

A company registered under the Companies Acts is bound by a contract not under seal if it is signed by any person acting under the express or implied authority of the company (*h*).

APPLICATION OF THE DOCTRINE OF PART PERFORMANCE TO CONTRACTS BY CORPORATIONS.

Where the Doctrine Applies.—The doctrine of part performance has been applied to contracts made by corporations aggregate, but a distinction must be drawn between the case of a corporation which, by common law, must contract under seal, and the case of a corporation acting as *urban* sanitary authority, which is subject to the express statutory requirements imposed by the Public Health Act, 1875, where the

(*f*) *Re Kingsbury Collieries, Ltd., and Moore*, [1907] 2 Ch. 259.

(*g*) 1 Bla. Com. 475; *Mayor of Oxford* v. *Crow*, [1893] 3 Ch. 535; *Mayor of Kidderminster* v. *Hardwick* (1873), L. R. 9 Ex., at p. 22.

(*h*) See Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 76; and Companies Clauses Act, 1845 (8 Vict. c. 16), s. 97.

value or amounts exceeds £50 (*i*). In the former case it is probable that the doctrine of part performance applies, although this was doubted by COTTON, L.J., in *Hunt* v. *Wimbledon Local Board* (*k*).

The earliest decision on this subject is that of Lord COTTENHAM in *London and Birmingham Rail. Co.* v. *Winter* (*l*). In that case the company made a contract for the purchase of land by an agent who had not been appointed under seal. The company having entered into possession and made a railway over the land, it was held that they could enforce specific performance. *Wilson* v. *West Hartlepool Rail. Co.* (*m*), decided twenty-five years later, is the precisely converse case. There the agent of the company agreed to sell land to the plaintiff, who was let into possession of the property. The court enforced specific performance at the suit of the purchaser, and TURNER, L.J., in his judgment (*n*) said: "I cannot hold that acts which, if done by an individual, would amount to fraud, ought not to be so considered if done by a company; nor can I say that it is no prejudice to the plaintiff to have been permitted to take possession on

(*i*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174; see *Young & Co.* v. *Mayor, etc. of Leamington Spa* (1883), 8 App. Cas. 523; and distinguish *Lawford* v. *Billericay Rural District Council*, [1903] 1 K. B. 722, the case of a rural as opposed to an urban authority.

(*k*) (1879), 4 C. P. D. 61; see also Dart, Vendors and Purchasers, 7th ed., 260, 261. It must be admitted that the cases on the subject can be to a large extent explained on the principle of *acquiescence*, as laid down in *Savage* v. *Foster* (1722), Wh. & Tu., L. C. Eq., 8th ed., Vol. I., 469 *et seq.*

(*l*) (1840), Cr. & Ph. 57; see also *Laird* v. *Birkenhead Rail. Co.* (1859), 29 L. J. Ch. 218.

(*m*) (1865), 2 De G. J. S. 475.

(*n*) *Ibid.*, at p. 493.

the faith of an agreement, and afterwards to be held liable to be treated as a trespasser and turned out of possession on the ground that there was no agreement."

In *Crook* v. *Corporation of Seaford* (*o*) the corporation agreed to lease to the plaintiff a part of the Seaford beach for the purpose of building a terrace. The resolution was regularly entered in the books of the corporation, but there was no contract under seal. After the plaintiff had been in possession for several years, and had expended large sums of money in building a terrace and sea-wall, the corporation tried to eject him, but the Court of Appeal compelled them to perform the contract by granting a lease for 300 years (*p*).

These decisions were approved by Lord LINDLEY, when a judge of first instance, in *Hunt* v. *Wimbledon Local Board* (*q*), and by the Privy Council in *Melbourne Banking Corporation* v. *Brougham* (*r*). The principle seems also to have been accepted by KELLY, C.B., in *Mayor of Kidderminster* v. *Hardwick* (*s*), and in two recent decisions by judges of the Chancery Division (*t*).

Where Doctrine is Inapplicable.—On the other hand, where a corporation is acting as urban sanitary

(*o*) (1871), L. R. 6 Ch. 551.

(*p*) See also *Wood* v. *Tate* (1806), 2 Bos. & P. N. R. 247.

(*q*) (1878), 3 C. P. D., at p. 214.

(*r*) (1879), 4 App. Cas. 169.

(*s*) (1873), L. R. 9 Ex., at pp. 19, 20.

(*t*) ROMER, J., in *Mayor, etc. of Oxford* v. *Crow*, [1893] 3 Ch., at p. 539; NORTH, J., in *Davis* v. *Corporation of Leicester*, [1894] 2 Ch., at p. 217.

authority, it is established by the decision of the Court of Appeal, in *Hunt* v. *Wimbledon Board* (u), and of the House of Lords, in *Young & Co.* v. *Mayor and Corporation of Royal Leamington Spa* (x), that a contract not under seal cannot be enforced, even although it has been fully performed by the party seeking to enforce it. These, however, were cases of work done for, and accepted by, a corporation; and the doctrine of part performance has been confined almost exclusively to contracts for an *interest in land* (y).

SECTION 5.

TRUSTEES OF CHARITY LANDS.

Jurisdiction of Charity Commissioners.—The Charity Commissioners have power under the Charitable Trusts Act, 1853, to authorise the sale of land belonging to a charity upon the application of the trustees or persons acting in the administration thereof (z), and may also authorise the sale or redemption of rentcharges (a).

The jurisdiction of the Charity Commissioners does not, however, extend to a charity which has no invested endowment yielding income for its support,

(u) (1878), 4 C. P. D. 48.

(x) (1883), 8 App. Cas. 517.

(y) See *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123; *cf.*, however, *Hammersley* v. *de Biel* (1845), 12 Cl. & F. 64 n.; *Lassence* v. *Tierney* (1849), 1 Macn. & G. 572; *Taylor* v. *Beech* (1749), 1 Ves. 279; *McManus* v. *Cooke* (1887), 35 Ch. D. 681.

(z) 16 & 17 Vict. c. 137, s. 24.

(a) *Ibid.*, s. 25.

nor in the case of a "mixed charity" (*b*) to donations or bequests given on such terms that the capital may legally be applied for the maintenance of the charity, notwithstanding that such donations or bequests have been invested as a permanent fund (*c*).

A charity cannot be said to be wholly maintained by voluntary contributions and therefore exempt from the Act, if it has freehold premises used for the purposes of the charity (*d*).

Sales authorised by the Charity Commissioners have the same validity as if they had been directed by the express terms of the trust affecting the charity (*e*). Even when the deed creating the trust expressly confers a power of sale, such power, in the case of an endowment subject to the jurisdiction of the commissioners, cannot in most cases be exercised by the trustees without the sanction of the Charity Commissioners or of the court (*f*). For by s. 29 of the Charitable Trusts Act, 1855 (*g*), it is enacted that it shall not be lawful for the trustees of a charity to sell otherwise than with the express authority of Parliament, or of a court or judge of competent jurisdiction, or according to a scheme legally established,

(*b*) A mixed charity is a charity maintained partly by "voluntary subscriptions" (*i.e.*, recurring gifts repeated annually or otherwise with more or less regularity) and partly by income from an endowment. See *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145.

(*c*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62; see *Re Church Army* (1905), 74 L. J. Ch. 624; 75 L. J. Ch. 467.

(*d*) *Att.-Gen.* v. *Mathieson*, [1907] 2 Ch. 383.

(*e*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 26.

(*f*) *Re Mason's Orphanage and London and North-Western Rail Co.*, [1896] 1 Ch. 596.

(*g*) 18 & 19 Vict. c. 124.

or with the approval of the board (*i.e.*, the Charity Commissioners).

A scheme legally established means a scheme either sanctioned by the Court of Chancery, or sanctioned by those other courts which under the Charitable Trusts Act, 1853, could sanction schemes (*h*).

In the case of educational charities the powers of the Charity Commissioners have now been transferred to the Board of Education.

SECTION 6.

BANKRUPTS.

Vesting of Bankrupt's Property in Trustee.—Immediately on a debtor being adjudged bankrupt, his property vests in the trustee in bankruptcy under ss. 20 and 54 of the Bankruptcy Act, 1883 (*i*), and by s. 43 of that statute, the title of the trustee relates back to the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition. A conveyance by the bankrupt for valuable consideration, made *before the date of the receiving order* to a person who has no notice of any available act of bankruptcy, is, however, protected by s. 49, even though it be in itself an act of bankruptcy (*k*).

It follows from the above that a bankrupt is unable

(*h*) *Re Mason's Orphanage*, [1896] 1 Ch., at p. 601.
(*i*) 46 & 47 Vict. c. 52.
(*k*) *Shears* v. *Goddard*, [1896] 1 Q. B. 406.

to convey property to which he was entitled at the time of the adjudication, or which he has subsequently acquired before his discharge. To this, however, an important exception was created by the rule in *Cohen* v. *Mitchell* (*l*), that, until the trustee intervenes, all transactions by the bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value in respect of his *after-acquired* property are valid, even though that person has notice of the bankruptcy. But it was held that the rule did not apply to the sale of after-acquired real estate, whether legal or equitable (*m*), although it did apply to the sale of leaseholds (*n*), and even to the sale of real estate belonging to a partnership since that is deemed to be personal property by virtue of s. 22 of the Partnership Act, 1890 (*o*). These subtle and unnecessary distinctions appear, however, to have been abrogated by the provisions of s. 11 of the Bankruptcy Act, 1913 (*p*), which enacts that "all transactions by a bankrupt with any person dealing with him bonâ fide and for value in respect of property whether real or personal, acquired by the bankrupt after adjudication shall if completed before any intervention by the trustee be valid against the trustee, and any estate or interest in such property which by virtue of the enactments relating to bankruptcy is vested in the trustee shall

(*l*) (1890), 25 Q. B. D. 262.

(*m*) *Re New Land Development Association and Gray*, [1892] 2 Ch. 138; *London and County Contracts, Ltd.* v. *Tallack* (1903), 19 T. L. R. 156; *Official Receiver* v. *Cooke*, [1906] 2 Ch. 661.

(*n*) *Re Clayton and Barclay's Contract*, [1895] 2 Ch. 212.

(*o*) *Re Kent County Gas Co.*, [1909] 2 Ch. 195.

(*p*) 3 & 4 Geo. 5, c. 34.

determine and pass in such manner and to such extent as may be required for giving effect to any such transaction" (*q*).

Sale by Trustee.—The trustee in bankruptcy may sell all or any part of the property of the bankrupt, by public auction or private contract, with power to transfer the whole thereof to any person or company (*r*).

When, instead of an order of adjudication, a composition or scheme of arrangement is entered into with the approval of the court under the Bankruptcy Act, 1890 (*s*), and a trustee is appointed to manage the debtor's property (*t*) such property vests in the trustee, and he has the same powers as a trustee in bankruptcy (*u*).

Neither the trustee in bankruptcy nor any member of the committee of inspection can purchase the bankrupt's property except by leave of the court (*x*); but the partner of a member of the committee of inspection can purchase for his own benefit (*y*).

(*q*) This subsection applies to transactions with respect to real property completed before the commencement of the Act (*i.e.*, the 1st April, 1914) in any case where there has not been any intervention by the trustee before that date.

(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 56.

(*s*) 53 & 54 Vict. c. 71, s. 3.

(*t*) *Ibid.*, s. 3 (16).

(*u*) *Ibid.*, s. 3 (17).

(*x*) Bankruptcy Rules, 1886 and 1890, r. 316.

(*y*) *Re Gallard*, [1897] 2 Q. B. 8.

SECTION 7.

CONVICTS.

Disability of Convict.—Since the Forfeiture Act, 1870 (*z*), the property of a convict is no longer forfeited, but he is incapable of entering into a contract or alienating his property (*a*). The Act provides for the appointment of an administrator with power to sell and convey the convict's property (*b*).

Although under s. 10 all the real and personal property of the convict vests in the administrator "for all the estate and interest of such convict therein," the administrator has no power to bar the estate tail of a convict, but the convict is still competent to execute a disentailing assurance which operates as an enlargement and not as an alienation of the estate tail (*c*).

(*z*) 33 & 34 Vict. c. 23.

(*a*) *Ibid.*, s. 8.

(*b*) Ss. 9, 12, 17; *Carr* v. *Anderson*, [1903] 2 Ch. 279. Where property is held by the convict as trustee or mortgagee only such beneficial interest as he may have therein vests in the administrator. Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48.

(*c*) *Re Gaskell and Walter's Contract*, [1906] 2 Ch. 1.

CHAPTER VI.

SALES BY FIDUCIARY VENDORS AND MORTGAGEES.

SECTION 1.

BY WHOM EXPRESS TRUSTS OR POWERS OF SALE MAY BE EXECUTED.

Trusts for Sale.—Although a trust vested in two or more trustees could be exercised by the survivors or survivor for the time being, there was formerly a doubt whether after the death of all the trustees, the trust could be exercised by the representatives of the last survivor in the absence of any indication of intention on the part of the settlor that they should do so. Suppose, for example, an estate were vested in A. and B. and *their heirs* in trust to sell, the legal personal representatives of the survivor of A. and B. (or, in the case of copyholds, the heir of such survivor) took the estate and could exercise the trust for sale (*a*); where, however, there was no mention of heirs or personal representatives or assigns in the instrument creating the trust, the preponderating view was that the trust could not be exercised after the death of the last surviving trustee, except by new trustees appointed for the purpose (*b*). Whatever

(*a*) *Re Morton and Hallett* (1880), 15 Ch. D. 143; Conveyancing Act, 1881, s. 30.

(*b*) *Cooke* v. *Crawford* (1842), 13 Sim. 91; *Mortimer* v. *Ireland* (1847), 11 Jur., 721; *per* JAMES and BAGGALLAY, L.JJ., in *Re Morton*

the true view may have been, it is now provided by s. 8 of the Conveyancing Act, 1911 (c), that until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or where there were two or more trustees, then of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to or capable of being exercised by the sole or last surviving or continuing trustee. But the section takes effect subject to any direction to the contrary expressed in the instrument, if any, creating the power or trust, and applies only to trusts constituted after or created by instruments coming into operation after the commencement of the Act of 1881. Moreover, the section does not apply to land of copyhold or customary tenure vested in the tenant on the Court rolls on trust, so that it may still be necessary to consider the old decisions in the case of such property.

Powers of Sale.—In considering who can exercise a *power of sale*, it is important to observe the distinction between a bare or naked power, and a power given to trustees who take the legal estate. A power is said to be a bare or naked power when the settlor has disposed of his property in one direction subject to a power in two or more persons enabling them to divert it in another direction, as in the case of a power of sale

and Hallett, supra; *Re Crunden and Meux*, [1909] 1 Ch. 690. Conf., however, *Osborne to Rowlett* (1880), 13 Ch. D. 774; *Re Waidainis*, [1908] 1 Ch. 123; *Re Routledge's Trusts*, [1909] 1 Ch. at p. 283.

(c) 1 & 2 Geo. 5, c. 37.

given to trustees in a strict settlement (*d*). Such a power must be construed strictly, and can only be exercised by the persons who are expressly or by reference designated as donees of the power (*e*).

On the other hand, where a testator first devises his real estate to trustees and their heirs, and afterwards empowers his trustees or trustee *for the time being* to sell, he must be considered to have contemplated a sale by the person or persons having the legal estate, and consequently the power can be exercised by the last surviving trustee, and after his death by his legal personal representatives, or, in the case of copyholds, by his heir or devisee (*f*).

With regard to trusts constituted after or created by instruments coming into operation after December 31st, 1881, it is enacted by s. 22 of the Trustee Act, 1893 (*g*), that "where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being." The combined effect of this section, of s. 37 of the Trustee Act (which deals with the powers of trustees appointed by the court), and of s. 8 of the Conveyancing Act, 1911, set out above, is that

(*d*) *Lane* v. *Debenham* (1853), 11 Hare, 195; *Re Bacon*, [1907] 1 Ch. 475.

(*e*) *Townsend* v. *Wilson* (1818), 1 B. & A. 608; *Newman* v. *Warner* (1851), 1 Sim. (N.S.) 457; *Re Rumney and Smith*, [1897] 2 Ch. 351.

(*f*) *Re Cunningham and Frayling*, [1891] 2 Ch. 567; *Re Pixton and Tong's Contract* (1898), 46 W. R. 187; *Re Bacon*, [1907] 1 Ch. 475.

(*g*) 56 & 57 Vict. c. 53.

every power given to trustees which enables them to deal with or affect the trust property is primâ facie given to them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being. Whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the primâ facie presumption. The reliance of the testator or settlor on the *individuals* to the exclusion of the holders of the office for the time being must be expressed in clear and apt language (*h*).

If land is devised to trustees in fee upon trust or with power to sell, and all the trustees disclaim (*i*) or predecease the testator, so that the legal estate in fee descends to the heir-at-law of the testator, such trust or power cannot be exercised by the heir (*k*). In such a case it is necessary to have new trustees appointed by the court under s. 25 of the Trustee Act, 1893 (*l*).

Where new trustees have been appointed under the statutory powers conferred by ss. 10 or 25 of the Trustee Act, they have the same powers, authorities,

(*h*) *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139.

(*i*) Whether expressly or *by conduct* see *Re Birchall* (1889), 40 Ch. D. 436.

(*k*) *Robson* v. *Flight* (1865), 4 De G. J. S. 613.

(*l*) 56 & 57 Vict. c. 53; *Nicholson* v. *Field*, [1893] 2 Ch. 511; *Sharp* v. *Sharp* (1819), 2 B. & A. 405. The donee of a power of appointing new trustees should not appoint himself either solely or jointly with other trustees; and such an appointment is probably void: *Re Sampson*, [1906] 1 Ch. 435, followed by WARRINGTON, J., in an unreported case.

and discretions as if they had originally been appointed trustees by the instrument, if any, creating the trust (*m*).

When the new trustee is appointed out of court, the legal estate can be vested in him by a vesting declaration under s. 12 of the Trustee Act, 1893. When he is appointed by the court, a vesting order should be obtained under s. 26 of the same Act.

In a case where there are more than two trustees one of the trustees may retire from the trust under s. 11 of the Trustee Act, 1893 (*n*), and if one of two trustees is the Public Trustee the other may retire under s. 5 (2) of the Public Trustee Act, 1906, but in any other case a trustee cannot resign his office except on the due appointment of some successor.

SECTION 2.

TIME OF EXERCISE OF EXPRESS TRUST OR POWER.

Duration of Trusts for Sale.—Where there is a *trust* to sell real estate, the trustees can perform the trust at any time, unless all the beneficiaries, having become *sui juris*, agree to take the property as realty. Any one of the beneficiaries can insist upon the trust being carried out (*o*). Even if the trust be to sell with all convenient speed, or to sell within a specified time,

(*m*) 56 & 57 Vict. c. 53, s. 10 (3), and s. 37.

(*n*) Unless there is a contrary intention in the instrument creating the trust.

(*o*) *Biggs* v. *Peacock* (1882), 22 Ch. D. 284; *Re Tweedie and Miles* (1884), 27 Ch. D. 315; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296, at pp. 312, 313.

such language is directory and not imperative, and a purchaser cannot raise the objection that the time for selling has elapsed (*p*). It was formerly doubtful, however, whether the trust for sale might not have been determined by the election of the beneficiaries. To meet this difficulty it has been provided by s. 10 (3) of the Conveyancing Act, 1911 (*q*), that where land has either before or after the commencement of the Act become subject to an express or implied trust for sale such trust is so far as regards the safety and protection of any purchaser thereunder to be deemed to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale. This applies to sales made before as well as after the commencement of the Act, but without prejudice to the order of any court restraining a sale.

On the other hand, a trust or power of sale cannot be *accelerated*. Consequently, if there be direction to sell after the death of A., the trust or power cannot be exercised in A'.s lifetime even with his consent (*r*).

Rule against Perpetuities.—It must be remembered, however, that the rule against perpetuities applies to trusts for sale as well as to powers of sale. Thus a future trust for sale is void if it is so framed as not to come into operation until a time which

(*p*) *Pearce* v. *Gardner* (1852), 10 Hare, 287.

(*q*) 1 & 2 Geo. 5, c. 37. The section is not very happily worded, and its precise effect appears to be doubtful. It might be argued that even though the trustees have sold pursuant to the trust and conveyed the land to a purchaser the trust is, by virtue of the section, still to be deemed to be subsisting so as to protect a subsequent purchaser without notice.

(*r*) Lewin, 492; Theobold, Wills, 424.

under the limitations of the deed or will *may* be beyond the period of a life or lives in being and twenty-one years afterwards (*s*).

No limitation after an estate tail is too remote, and consequently a trust for sale which does not arise until after the determination of an estate tail is not void for perpetuity (*t*).

Duration of Powers of Sale.—With regard to *powers* of sale, if there is no limit of time expressed for the exercise of the power it usually becomes extinguished when, by reason of the expiration or cesser of the limitations contained in the settlement, absolute interests fall into possession and is therefore necessarily within the rule against perpetuities (*u*). But when it is clear, either from the express language of the instrument creating the power, or by necessary implication, that the settlor created the power *for the purpose of division*, because it is more convenient to make a division by selling the property and dividing the money, the power may be exercised even after absolute interests have vested in possession in persons *sui juris* provided that they have not in fact determined the trust and so put an end to the power (*x*). That is to say, the duration of the

(*s*) *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Daveron, Bowen* v. *Churchill*, [1893] 3 Ch. 421; *Re Wood, Tullett* v. *Colville*, [1894] 3 Ch. 381.

(*t*) *Heasman* v. *Pearse* (1871), 7 Ch. 282, 283.

(*u*) *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D., at p. 433.

(*x*) *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429; *Re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334; *Re Dyson and Fowke*, [1896] 2 Ch. 720.

power is a mere question of the intention of the donor, and if the donor appears to have intended that it should continue, then, subject to the rule against perpetuities and provided that the beneficiaries have not determined the trust, the trustees can sell without the concurrence of any of them (*y*). Thus a power for trustees to sell during the life of a lunatic is not determined by the lunatic becoming absolutely entitled (*z*).

An unlimited collateral power of sale in a strict settlement by which estates tail are created is good (*a*), but if once an estate in fee has been acquired by anyone claiming under the limitations of the settlement, the power becomes extinct (*b*).

So far we have discussed *express* powers of sale, both as regards the persons to exercise them and the time of exercise.

But such a power may also be *implied*.

SECTION 3.

SALE BY PERSONAL REPRESENTATIVES AND TRUSTEES UNDER IMPLIED OR STATUTORY POWERS.

Power of Sale under Land Transfer Act.—In the case of persons dying after December 31st, 1897, real estate which is vested in any person without a right in any other person to take by survivorship,

(*y*) *Re Cotton's Trustees and the School Board of London* (1882), 19 Ch. D. 624.

(*z*) *Re Jump*, [1903] 1 Ch. 129. As to what amounts to an effectual election so as to extinguish a trust or power of sale, see *Re Douglas and Powell's Contract*, [1902] 2 Ch., at p. 312.

(*a*) *Waring* v. *Coventry* (1833), 1 My. & K. 249; *Re Lord Sudeley and Baines & Co.*, [1894] 1 Ch., at p. 339.

(*b*) *Cole* v. *Sewell* (1843), 4 Dr. & W., at p. 32.

devolves on his death, notwithstanding any testamentary disposition, and becomes vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him (*c*).

Although the marginal note to s. 1 of the Land Transfer Act speaks of the devolution of the *legal* interest in real estate, the Act clearly applies to *equitable* as well as legal estates (*d*). The effect of the statute appears to be that freehold land which is vested in a person solely for a devisable estate, whether legal or equitable, and copyhold land which is vested in a person solely for a devisable estate which is *equitable only* (*i.e.*, where he has not been admitted tenant on the court rolls) devolve to and vest in the personal representatives in the same way as chattels real.

The personal representatives have an implied power from the nature of their office to sell real estate so devolving on them for the payment of the testator's debts, and to satisfy the costs and expenses incurred in the administration of his estate. But unlike chattels real, which may be sold by one of two or more executors without the concurrence of the others (*e*), it is not lawful for some or one only of

(*c*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (1). But real estate here does not include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant, sub-s. (4). Equitable estates in copyholds, however, devolve under the Act. *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

(*d*) *Re Harrowby and Pain's Contract*, [1902] W. N. 137; *Re Somerville and Turner's Contract*, [1903] 2 Ch., at p. 588.

(*e*) *Simpson* v. *Gutteridge* (1816), 1 Madd. 616. The rule probably applies to administrators. See Williams, Executors, 821.

several joint personal representatives without the authority of the court to sell or transfer real estate (*f*). Where, however, probate is granted to one or some of several persons named as executors, power being reserved to the others or other to prove, the sale transfer or disposition of real estate may, notwithstanding this provision, be made by the proving executor or executors without the authority of the court, and will be as effectual as if all the persons named as executors had concurred therein (*g*). And it has been decided that since personal representatives have power to dispose of real estate vesting in them as such, a purchaser from them gets a good title so long as he has no notice that the sale was unnecessary (as to which he has no right to require any evidence); and even if it should subsequently appear that the deceased had left a will, or a later will, as the case may be, under which other persons are appointed executors, and the original grant be revoked accordingly, the purchaser's title will not be divested. For the person for the time being clothed with the character of legal personal representative is the legal personal representative and enjoys all the powers of the legal personal representative until the grant is revoked or has determined (*h*).

English real estate or chattels real do not vest in

(*f*) 60 & 61 Vict. c. 65, s. 2 (2).

(*g*) Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 12, overruling *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58. This section applies to probates granted before as well as after the commencement of the Act (*i.e.* 1st January, 1912), but only as respects dispositions made after the commencement of the Act.

(*h*) *Hewson* v. *Shelley*, [1914] W. N. 127, reversing [1913] 2 Ch. 384.

persons who are not entitled to probate in this country, and therefore a good title can be made by the *general* executors of a will without the concurrence of special executors appointed in respect of the testator's foreign assets (*i*).

Effect of Assent to devise.—The power of sale of the personal representatives is, of course, extinguished if they have assented to a devise of the land or conveyed it to the devisee, or, in the case of an intestacy, have conveyed it to the heir-at-law (*k*). It has been held that a parol assent by executors is sufficient (*l*). An assent in writing does not require a stamp (*m*).

If the personal representatives are in possession of the land, a purchaser may safely assume that there are unpaid debts, and that there has been no assent or conveyance to the devisee or heir. On the other hand, if the devisee or heir is in possession, the onus will lie on the personal representatives to show that their power of sale has not been determined (*n*).

Power of Sale under Charge of Debts and Legacies.—In the case of persons who died prior to January 1st, 1898, the power of the personal representatives to sell depends on whether debts or legacies

(*i*) *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 1.

(*k*) *Cf.* Land Transfer Act, 1897, s. 3. It is presumed that the provisions as to assent do not apply to the case of intestacy. See Brickdale and Sheldon, 289.

(*l*) *Re Pix,* [1901] W. N. 165.

(*m*) *Kemp* v. *Inland Revenue,* [1905] 1 K. B. 581.

(*n*) See Brickdale and Sheldon, 271.

are charged on real estate, either by the express language of the will or by necessary implication.

A direction for payment of the testator's debts creates a charge for such payment on his realty (o), unless there is a subsequent charge on a specific part of his real estate which overbears the implied charge, on the principle, *expressum facit cessare tacitum* (p).

A mere *authority* to pay debts, as opposed to a *direction*, does not create a charge on real estate (q), nor, apparently, does a direction by the testator that his debts shall be paid by his executors (r).

Where there is a direction that the executors shall pay the testator's debts, followed by a gift of *all* his real estate to them *either beneficially or on trust*, all the debts will be payable out of all the estate so given to them (s). If there is an express charge of debts on real estate it will not be restricted, even though a fund be subsequently mentioned out of which debts are to be paid (t). With regard to the implied charge of legacies, it has been established by the rule in *Greville* v. *Browne* (u) that if there is a gift of legacies followed or preceded (x) by a devise of "the *residue* of

(o) *Forbes* v. *Peacock* (1840), 11 Sim. at p. 160; *Re Stokes* (1892), 67 L. T. 223.

(p) *Douce* v. *Lady Torrington* (1833), 2 My. & K. 600; *Corser* v. *Cartwright* (1873), L. R. 8 Ch. at p. 975.

(q) *Re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310.

(r) *Brydges* v. *Landen* (1788), cited 3 Ves. 550.

(s) *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465.

(t) *Wrigley* v. *Sykes* (1856), 21 Beav. 337.

(u) (1859), 7 H. L. Cas. 689.

(x) *Elliott* v. *Dearsley* (1880), 16 Ch. D. 322.

my real and personal estate," or of "my real and personal estate *not otherwise disposed of*" (*y*), the legacies are charged on the residue, even though interests in land have been previously given by the will (*z*).

With regard to *specifically* devised lands, the question must always be one of intention, but the rule is that the presumption is against an intention to charge lands specifically devised, and that a mere charge "on all my lands" is not sufficient to rebut that presumption (*a*).

Power of Sale under Lord St. Leonards' Act. — The Law of Property Amendment Act, 1859, commonly called Lord St. Leonards' Act (*b*), confers on *devisees in trust* to whom a testator dying after August 13th, 1859, has devised real estate *for the whole of his estate or interest therein* (*c*) charged with the payment of debts or legacies, a power to raise the same, notwithstanding that the will does not contain an express power of sale. By s. 16 of the Act, if a testator creating such a charge shall not have devised the hereditaments so charged in such terms that his whole estate or interest shall become vested in any trustee or trustees, a like power is conferred on his executors, unless there is a devise in fee or in tail or for the testator's whole estate and interest charged with

(*y*) *Re Bawden*, [1894] 1 Ch. 693.

(*z*) *Bench* v. *Biles* (1819), 4 Madd. 187.

(*a*) *Conron* v. *Conron* (1858), 7 H. L. Cas. 190; but *cf. Bank of Ireland* v. *M'Carthy*, [1898] A. C. 181.

(*b*) 22 & 23 Vict. c. 35, ss. 14, 15.

(*c*) See *Re Adams and Perry's Contract*, [1899] 1 Ch. 554.

debts or legacies to a single person, or to a number of persons as joint tenants or tenants in common (*d*). The power conferred on executors does not extend to an administrator with the will annexed (*e*).

Purchasers or mortgagees are not bound to inquire whether the powers conferred by ss. 14, 15, and 16 of the Act have been duly exercised by the persons acting in virtue thereof (*f*). Thus, in the case of an executor selling under s. 16, a purchaser is not, as a rule, entitled to inquire whether the debts of the testator have been paid. If, however, twenty years have elapsed since the testator's death, there is a presumption of law that all debts have been paid, and the purchaser is put on his inquiry whether any debts in fact remain unpaid in respect whereof the executors can exercise their statutory power of sale (*g*).

This does not apply to the case of the sale by an executor of leasehold property which vests in, and can be sold by him *virtute officii*. In such a case a purchaser is not entitled to inquire whether debts have been paid, even after twenty years, unless the leaseholds are actually in the possession of a legatee (*h*). But if the purchaser has actual notice that all debts have been paid he cannot safely accept a title from

(*d*) See proviso in s. 18; *Re Barrow-in-Furness Corporation and Rawlinson's Contract*, [1903] 1 Ch. 339.

(*e*) *Re Clay and Tetley* (1880), 16 Ch. D. 7.

(*f*) S. 17.

(*g*) *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465.

(*h*) *Re Whistler* (1887), 35 Ch. D. 561; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101. See also the comments made on these cases by Lord HALDANE, L.C., in *Attenborough* v. *Solomon*, [1913] A. C., at pp. 83 and 85, which should be carefully considered when leaseholds are being sold by executors who are also trustees.

the executors (*i*); and in one case where the vendors of leaseholds declined to convey as personal representatives, and the assignment was ultimately taken from them as trustees, it was held that the purchaser had not acquired a good title (*k*).

Other Implied Powers.—If there is no charge of debts or legacies on real estate, a mere direction that the land is to be sold without saying by whom, does not in the case of a testator who died before January 1st, 1898, entitle the executors to sell unless it is clearly implied that the produce of the sale is to pass through their hands in the execution of their office (*l*).

Where the purposes of a will could not be effected without a conversion of the whole estate, a direction to "pay and divide" has been held to imply a trust for sale (*m*). But where there is an *express* power of sale, or where it is apparent that the testator contemplated that the property would be enjoyed in specie, a trust to divide does not imply a trust for sale (*n*).

In the case of settlements, a power of sale is implied by a power to vary securities, if there is a declaration that purchased realty shall be considered as personalty (*o*), or where the context shows that

(*i*) *Re Verrell's Contract*, [1903] 1 Ch. 65.

(*k*) *Re King and Owen* (1906), 121 L. T. Newsp. 341. The trust for sale had not arisen.

(*l*) *Bentham* v. *Wiltshire* (1819), 4 Madd. 44; *Tylden* v. *Hyde* (1825), 2 Sim. & St. 238; *Re Sankey* (1889), W. N. 79.

(*m*) *Mower* v. *Orr* (1849), 7 Hare, 473.

(*n*) *Cornick* v. *Pearce* (1849), 7 Hare, 477; *Re Wintle* (1896), 65 L. J. Ch., at p. 868.

(*o*) *Tait* v. *Lathbury* (1865), L. R. 1 Eq. 174.

"securities" means "investments" (*p*); and a power to vary *investments* will in any case imply a power of sale if land is an authorised investment, or becomes subject to the settlement by virtue of a covenant to bring in after-acquired property (*q*).

Trustees and executors and other persons authorised or required by the Finance Act, 1894, to pay the estate duty in respect of real estate have a statutory power of sale for the purpose of raising the duty, whether the property is or is not vested in them (*r*).

It is also provided by s. 9 of the Conveyancing Act, 1911 (*s*), that where any property vested in trustees by way of security becomes by virtue of the statutes of limitation, or of an order for foreclosure or otherwise discharged from the right of redemption, it shall be held by them on trust for sale, with power to postpone such sale for such a period as they may think proper.

And by s. 10 of the same Act that where a settlement within the meaning of s. 63 of the Settled Land Act, 1882, or other settlement of property as personal estate contains a power to invest money in the purchase of land such land shall, unless the settlement otherwise provides, be held by the trustees upon trust for sale with power to postpone the sale.

If a trustee has applied the trust funds in the purchase of real estate where such an investment

(*p*) *Re Rayner*, [1904] 1 Ch. 177.

(*q*) *Re Garnett, Orme and Hargreave's Contract* (1883), 25 Ch. D. 595; *Re Gent and Eason*, [1905] 1 Ch. 386; *Re Pope*, [1911] 2 Ch. 442.

(*r*) 57 & 58 Vict. c. 30, s. 9 (5), and see *Perrins* v. *Bellamy*, [1899] 1 Ch. 799.

(*s*) 1 & 2 Geo. 5, c. 37.

was not authorised by the settlement, a purchaser from the trustee should require the concurrence of one of the beneficiaries, since the beneficiaries may, if they all agree, elect to adopt the breach of trust and retain the property as realty (*t*). But no such concurrence is necessary if any one of the beneficiaries is incapable of electing (*u*).

SECTION 4.

MODE OF SALE BY FIDUCIARY VENDORS.

Exercise of Express Trusts and Powers.—In the case of express trusts or powers, the mode of sale authorised must be followed. If a sale by auction is directed at a sum mentioned in the instrument creating the trust, a sale by private contract at that sum must not be made, and vice versâ (*v*); and when the sale is by auction, due notice and advertisements of the sale should be given (*x*). If the trust does not direct the mode of sale, it may be made either by public auction or private contract, and s. 13 of the Trustee Act, 1893, provides that "when a trust for sale or a power of sale of property is vested in a trustee, he may sell, or concur with any other person in selling, all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions

(*t*) *Re Patten and Edmonton Union* (1883), 52 L. J. Ch. 787; *Power* v. *Banks*, [1901] 2 Ch., at p. 496.

(*u*) *Re Jenkins and Randall's Contract*, [1903] 2 Ch. 362.

(*v*) *Daniel* v. *Adams* (1764), Amb. 495.

(*x*) *Ord* v. *Noel* (1820), 5 Madd. 438.

respecting title, or evidence of title, or other matter as the trustee thinks fit, with power to vary any contract for sale, and buy-in at any auction, or to rescind any contract for sale, and to resell without being answerable for any loss" (y).

A power to sell leasehold property comprised in one lease may be exercised, on a sale of the property in lots, by granting underleases for the whole term, less one day at an apportioned rent (z).

A power *to sell* means, in the absence of any context, a power to sell *for money*, and a person who exercises such a power is bound to sell for money. But under a trust to sell "as absolute owners" trustees have been held justified in selling in consideration of a rent-charge (a). Trustees cannot, however, sell at a price to be fixed by a third party (b).

Concurrence with other Owners.—Although trustees may concur with the owners of another property in selling both properties together, it is their duty to see that their share of the purchase-money is apportioned before completion; and a purchaser must take care to see that this is done, because he can only pay trust money to the trustees. If it is not manifest that it is more beneficial to sell the two properties together, the purchaser should require the evidence of a

(y) 56 & 57 Vict. c. 53, s. 13 (1), (3). Re-enacting s. 35 of the Conveyancing Act, 1881. This section applies only to a trust or power created by an instrument coming into operation after December 31st, 1881.

(z) *Re Judd and Poland and Skelcher's Contract*, [1906] 1 Ch. 684.

(a) *Re Jackson* (1900), 44 Sol. J. 573.

(b) *Re Wilton*, [1907] 1 Ch. 55.

competent surveyor that it is a prudent and right thing to do so (c).

Notwithstanding that the section quoted above gives the trustees power to sell "*any part* of the property," they cannot sell the trust estate separate from the timber standing on it (d); but it is conceived that there is no objection to the timber being sold at a separate valuation if the price is paid to the trustees. Nor can trustees sell the trust estate with an exception or reservation of minerals without the sanction of the court under s. 44 of the Trustees Act, 1893 (e).

Consent of Tenant for Life.—By sub-s. 2 of s. 13 of the Trustee Act, 1893, this section only applies "if and so far as a contrary intention is not expressed in the instrument creating the trust or power." Consequently where trustees are empowered to sell at the request and by the direction of the tenant for life, the purchaser should require evidence that such request and direction have, in fact, been given (*f*). Moreover, it should be borne in mind that if the land is settled land within the meaning of the Settled Land Acts, a power of sale cannot be exercised without the consent of the tenant for life (*g*), but the consent of any one of two or more persons constituting the tenant for life

(c) *Re Cooper and Allen's Contract* (1876), 4 Ch. D. 802.

(d) Lewin, 495; and *cf.* s. 13 of Lord St. Leonards' Act; Settled Land Act, 1882, s. 35.

(e) *Re Skinner*, [1896] W. N. 68; and *cf.* Settled Land Act, 1882, s. 17.

(*f*) Underhill, Trusts, 255.

(*g*) Settled Land Act, 1882, s. 56 (2); *De Moleyns and Harris' Contract*, [1908] 1 Ch. 110.

is sufficient (*h*), and it is not necessary that the consent should be in writing (*i*); nor can the purchaser require the tenant for life's concurrence in the conveyance if there is evidence that he has in fact consented, even though it be not in writing (*j*). In the case of a *trust* for sale, the consent of the tenant for life is not necessary unless required by the terms of the settlement (*k*). If the consent of the tenant for life is required by the terms of the settlement, and the tenant for life has incumbered his life estate, the concurrence of the incumbrancer must be obtained (*l*).

A trustee who is either a vendor or purchaser may sell or buy without excluding the application of s. 2 of the Vendor and Purchaser Act, 1874 (*m*).

SECTION 5.

PURCHASE BY PERSONS IN A FIDUCIARY POSITION.

Disability of Trustee, etc., to purchase.—Persons acting in a fiduciary character, such as trustees, executors, and administrators, trustees in bankruptcy, directors or liquidators of companies, governors of charities, agents for sale, and other persons occupying a position with reference to the property or affairs of another inconsistent with the duties or interests of a

(*h*) Settled Land Act, 1884, s. 6 (2); *Re Osborne and Bright's, Limited*, [1902] 1 Ch. 335.

(*i*) *Gilbey* v. *Rush*, [1906] 1 Ch., at p. 23; *Re Pope*, [1911] 2 Ch. 442; but *cf. Phillips* v. *Edwards* (1864), 33 Beav. 440.

(*j*) *Re Pope, supra. Sed quære* whether the purchaser is not entitled to covenants for title from the tenant for life.

(*k*) Settled Land Act, 1884, s. 6 (1).

(*l*) *Re Bedingfield and Herring's Contract*, [1893] 2 Ch. 332.

(*m*) Trustee Act, 1893, s. 15.

purchaser, cannot themselves purchase the property with which they are thus connected or entrusted (*n*). Thus, a receiver appointed by the court (*o*), an arbitrator contracting for unascertained claims of parties to the reference (*p*), commissioners for inclosure under a General Inclosure Act, who cannot purchase land in a parish in which an inclosure is made until five years from the date and execution of their award (*q*), or valuers acting under the Commons Inclosure Act, who are under a similar disability for the term of seven years (*r*), are all unable to purchase the property with which they are thus fiducially connected.

A person who has never acted as trustee and has disclaimed the trust is under no disability (*s*), and it has been held that the fact that a man has once been a trustee twelve years before the sale is no reason why he should not purchase the property (*t*); but a trustee cannot get rid of his incapacity, after he has once acted as trustee, merely by retiring from the trust (*u*). A purchase by a trustee from himself, where he performs the two functions of seller and buyer, is always voidable, nor can he repurchase the

(*n*) See *Fox* v. *Mackreth* (1788), 2 Bro. Ch. 400; Wh. & Tu., L. C. Eq., 8th ed., Vol. II., 722, and notes thereto; Dart, Vendors and Purchasers, 7th ed., 37—58. A trustee to preserve contingent remainders may purchase from his *cestui que trust* (*Parkes* v. *White* (1805), 11 Ves. 226).

(*o*) *Nugent* v. *Nugent*, [1907] 2 Ch. 292.

(*p*) *Blennerhasset* v. *Day* (1811), 2 Ball & B. 116.

(*q*) 41 Geo. 3, c. 109, s. 2.

(*r*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 129.

(*s*) *Clark* v. *Clark* (1884), 9 App. Cas. 733.

(*t*) *Re Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244.

(*u*) *Ex parte James* (1803), 8 Ves. 352.

property from his own purchaser so long as the contract is executory only, the original purchaser not having paid his purchase-money or taken up his conveyance (*x*). On the other hand, a purchase by a trustee from the *cestui que trust* may be supported if the relation of trustee and *cestui que trust* be previously dissolved, or the parties agree to stand with reference to each other in the character of vendor and purchaser (*y*), and the trustee behaves fairly and honestly.

A trustee may in some cases obtain the sanction of the court to a sale by him to himself (*z*). A preliminary contract should be entered into and submitted to the court for approval by summons under R. S. C., Order LV., r. 3.

A solicitor may purchase from his client, but it is essential that the client should be advised by some disinterested solicitor, and it would rest with the solicitor purchasing to prove that he gave an adequate consideration (*a*); and if the solicitor purchase through the intervention of a third party, so that the client is not aware that the solicitor is the real purchaser, the transaction cannot be supported (*b*).

A relative of a disqualified person may purchase

(*x*) *Delves* v. *Gray*, [1902] 2 Ch. 606.

(*y*) *Gibson* v. *Jeyes* (1801), 6 Ves. 266; *Coles* v. *Trecothick* (1804), 9 Ves. 247; Underhill, Trusts, 405, 406; Lewin, Trusts, 555; *Dougan* v. *Macpherson*, [1902] A. C. 197.

(*z*) *Campbell* v. *Walker* (1800), 5 Ves., at p. 682; *Tennant* v. *Trenchard* (1869), L. R. 4 Ch. 537; *Boswell* v. *Coaks* (1883), 23 Ch. D. 302 (1886), 11 App. Cas. 232.

(*a*) *Edwards* v. *Meyrick* (1842), 2 Hare, 63; *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*b*) *McPherson* v. *Watt* (1887), 3 App. Cas. 254.

bonâ fide on his own account (*c*), and the court will in the absence of fraud decree a specific performance at the suit of the purchaser (*d*). It has been doubted whether a trustee can sell to his own wife, but although such a transaction would be open to the gravest suspicion (*e*), it is not necessarily invalid (*f*).

A tenant for life under a settlement, whose consent is necessary to the exercise of a power of sale by the trustees, may nevertheless purchase from them under the power (*g*).

SECTION 6.

MORTGAGEES.

Sale by Mortgagee.—A sale by a mortgagee can be made either by virtue of an express power in the mortgage deed, or of the statutory powers conferred by Lord Cranworth's Act (*h*) or the Conveyancing Act, 1881 (*i*). The powers of these Acts may, however, be excluded by a contrary intention expressed in the indenture of mortgage (*k*), and only apply to mortgages made by *deed*.

(*c*) *Ferraby* v. *Hobson* (1847), 2 Phil. 261.

(*d*) *Prestage* v. *Langford* (1771), 3 Wooddeson, 448 n.; *Coles* v. *Trecothick* (1804), 9 Ves. 234.

(*e*) *Dowager Duchess of Sutherland* v. *Duke of Sutherland*, [1893] 3 Ch. 169.

(*f*) *Gilbey* v. *Rush*, [1906] 1 Ch. 11.

(*g*) *Howard* v. *Ducane* (1823), Turn. & R. 81; *Dicconson* v. *Talbot* (1870), L. R. 6 Ch. 32; and *cf.* Settled Land Act, 1890, s. 12.

(*h*) 23 & 24 Vict. c. 145, ss. 11–16, repealed by the Conveyancing Act, 1881, s. 71.

(*i*) 44 & 45 Vict. c. 41, ss. 19—22.

(*k*) Lord Cranworth's Act, s. 32; Conveyancing Act, 1881, s.

When Power of Sale Arises.—The power of sale conferred on mortgagees by the Conveyancing Act arises "when the mortgage money has become due," *i.e.*, after the day appointed for payment by the mortgage deed, which is usually fixed at six months from the date of the mortgage, in any of the three following cases, viz. (*l*):

(1) When notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money or part thereof for three months after such service (*m*); or

(2) Some interest under the mortgage is in arrear and unpaid for two months after becoming due (*n*); or

(3) There has been a breach of some provision contained in the mortgage deed or the Act, and on the part of the mortgagor or of some person concurring in making the mortgage to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon (*o*).

Power of Sale, how exercisable.—A mortgagee selling under a power of sale cannot be correctly

19 (3); Conveyancing Act, 1911, s. 4 (2). As to meaning of contrary intention, see article in Law Times Newsp., Vol. CVI., p. 598.

(*l*) Conveyancing Act, 1881, s. 19 (1).

(*m*) *Ibid.*, s. 20 (1); see also s. 67, and *Barker* v *Illingworth*, [1908] 2 Ch. 20.

(*n*) *Ibid.*, s. 20 (2).

(*o*) *Ibid.*, s. 20 (3).

classed under the head of Fiduciary Vendors. There is, in fact, no fiduciary relation between mortgagee and mortgagor until the mortgagee has realised his security and received more than enough to pay what is due upon it, in which case he stands in a fiduciary position with regard to the balance. Thus, not only can the mortgagee purchase the equity of redemption from the mortgagor (*p*), but he can sell the mortgaged estate under a power of sale to one of two mortgagors (*q*).

A mortgagee cannot sell to himself either alone or with others, nor to a trustee for himself (*r*), nor to any one employed by him to conduct the sale (*s*). With this exception a mortgagee can sell to anybody who can buy, provided that he acts bonâ fide, and does not fraudulently, wilfully, or recklessly sacrifice the property of the mortgagor (*t*). The mortgagee has the right to obtain payment of his debt through the exercise of his power when it has arisen, without regard to the then existing condition of the market.

(*p*) *Knight* v. *Majoribanks* (1849), 2 Macn. & G. 10.

(*q*) *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*r*) *Downes* v. *Grazebrook* (1817), 3 Meri. 200; *Robertson* v. *Norris* (1858), 1 Giff. 421. If he sells to himself the power of sale is not exhausted (*Henderson* v. *Astwood*, [1894] A. C. at p. 162).

(*s*) *Whitcomb* v. *Minchin* (1820), 5 Madd. 91; *Martinson* v. *Clowes* (1882), 21 Ch. D. 857; *Hodson* v. *Deans*, [1903] 2 Ch. 647. In *Nutt* v. *Easton*, [1899] 1 Ch. 873; [1900] 1 Ch. 29, a sale by a mortgagee to his solicitor was upheld, but in that case there had been gross laches on the part of the plaintiff, and it was not clear that the solicitor ever acted in the matter of the sale.

(*t*) *Kennedy* v. *De Trafford*, [1907] A. C. 180; *Farrar* v. *Farrars, Limited* (1888), 40 Ch. D. 395; *Warner* v. *Jacob* (1882), 20 Ch. D. 220. See also Conveyancing Act, 1881, s. 21 (6).

When the power of sale under the Act has become exercisable the mortgagee can sell, or concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions respecting title, or evidence of title, or other matter as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell without being answerable for any loss occasioned thereby (*u*). In the absence of collusion or fraud there is nothing in the terms of an ordinary power of sale in a mortgage to prevent a mortgagee who is selling from allowing part of the purchase-money to remain on mortgage at his own risk (*x*). The ordinary power of sale does not authorise the mortgagee to sell fixtures apart from the freehold (*y*), and if such a power is expressly given, the mortgage deed must be registered as a bill of sale (*z*), nor can the mortgagee sell the land apart from the timber unless he is a mortgagee in possession (*a*).

But the power of sale now includes the following powers as incident thereto (namely) :—

(i) A power to impose or reserve or make binding as far as the law permits by covenant, condition or otherwise on the unsold part of

(*u*) Conveyancing Act, 1881, s. 19 (1). As to first and second mortgagees concurring in the sale, see *M'Carogher* v. *Whieldon* (1864), 34 Beav. 107.

(*x*) Farwell, Powers, 560.

(*y*) *Re Yates, Batcheldor* v. *Yates* (1888), 38 Ch. D. 112.

(*z*) *Johns* v. *Ware*, [1899] 1 Ch. 359.

(*a*) Conveyancing Act, 1881, s. 19 (1), cl. 4.

the mortgaged property or any part thereof or on the purchaser and any property sold, any restriction or reservation with respect to building on, or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof or with respect to any other thing:

(ii) A power to sell the mortgaged property or any part thereof or any mines and minerals apart from the surface:—

(*a*) With or without a grant or reservation of rights of way, rights of water, easements, rights and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part thereof or to any property sold;

(*b*) With or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage and other powers, easements, rights and privileges for or connected with mining purposes in relation to the property remaining unsold or any part thereof or to any property sold;

(*c*) With or without covenants by the purchaser to expend money on the land sold (*b*).

(*b*) Conveyancing Act, 1911, s. 4. This section applies only where the mortgage deed is executed after the commencement of the Act (January 1st, 1912). It was held, however, under the Act of 1881 that the mortgagee could give a purchaser of part of the land an implied easement of light over other parts (*Born* v.

What the Mortgagee can convey.—A mortgagee exercising the power of sale conferred by the Conveyancing Act has power by deed to convey the property sold "*for such estate and interest therein as is the subject of the mortgage*, freed from all estates, interests, and rights to which the mortgage has priority but subject to all estates, interests, and rights which have priority to the mortgage" (*c*). The mortgagee can therefore give the purchaser the estate discharged from the equity of redemption, but an equitable mortgagee cannot by virtue merely of the statutory power convey the legal estate (*d*).

In the case of copyholds, the legal right to admittance does not pass by a deed under the Conveyancing Act unless the deed is "sufficient otherwise by law, or is sufficient by custom in that behalf," so that where a mortgagee of copyholds has taken a surrender, with a legal right to admittance on payment of a fine, he cannot pass such legal right without being first admitted himself (*e*).

Protection of Purchaser.—Where a conveyance is made *in professed exercise* of the power of sale conferred by the Act, the title of the purchaser is not

Turner, [1900] 2 Ch. 211), and he could sell the surface apart from the minerals, or vice versâ, with the leave of the Court under s. 44 of the Trustee Act, 1893, and s. 3 of the Trustee Act, 1894. An application under these Acts is not now required (sub-s. (4)).

(*c*) Conveyancing Act, 1881, s. 21 (1).

(*d*) *Re Hodson and Howe's Contract* (1887), 35 Ch. D. 668. It was otherwise under Lord Cranworth's Act which enabled an equitable mortgagee to convey whatever legal estate was in the mortgagor at the time of the mortgage (*Re Soloman and Meagher's Contract* (1889), 40 Ch. D. 508).

(*e*) Conveyancing Act, 1881, s. 21 (1).

impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised (*f*); and in the case of a bonâ fide purchaser the only remedy of the person damnified is against the mortgagee who exercised the power (*g*). A purchaser is not and never has been either before or on conveyance concerned to see or inquire whether a case has arisen to authorise the sale or due notice has been given or the power is otherwise properly or regularly exercised (*h*); but if he knows that notice has not been given or any other irregularity committed the sale may be set aside (*i*).

A mortgagee, at any time after the power of sale conferred by the Conveyancing Act has become exercisable, can recover the title deeds which a purchaser would be entitled to demand from the mortgagor or subsequent mortgagees (*k*).

By whom exercisable.—The powers of a mortgagee under the Conveyancing Act may be exercised by "any person for the time being entitled to receive

(*f*) A purchaser without notice is protected even when the power of sale has been suspended by an order *nisi* for foreclosure (*Stevens* v. *Theatres, Limited*, [1903] 1 Ch. 857).

(*g*) Conveyancing Act, 1881, s. 21 (2); and *cf.* similar provisions in s. 13 of Lord Cranworth's Act; and see *Bailey* v. *Barnes*, [1894] 1 Ch. 25.

(*h*) Conveyancing Act, 1911, s. 5, overruling *Re Life Interest, etc. Corporation* v. *Hand in Hand Insurance Society*, [1898] 2 Ch., at p. 238.

(*i*) *Selwyn* v. *Garfit* (1888), 38 Ch. D. 273.

(*k*) Conveyancing Act, 1881, s. 21 (7); and *cf.* Lord Cranworth's Act, s. 16.

and give a discharge for the mortgage money" (*l*): that is to say, by the original mortgagee, his executors, administrators and assigns (*m*), and where there are two or more mortgagees by the survivor of them (*n*).

(*l*) Conveyancing Act, 1881, s. 21 (3), cl. (4).

(*m*) *Ibid.*, s. 2 (vi). For an instance of an express power not exercisable by a transferee, see *Re Rumney and Smith*, [1897] 2 Ch. 351.

(*n*) *Hind* v. *Poole* (1855), 1 Kay & J. 383; and see Conveyancing Act, 1881, s. 61.

CHAPTER VII.

LIMITED OWNERS.

SECTION 1.

SALES UNDER THE SETTLED LAND ACTS.

Preliminary Questions.—In a large number of cases the vendor is not the absolute owner of the property which he desires to sell, but proposes to avail himself of the statutory powers conferred on limited owners by the Settled Land Acts, 1882—1890. In these circumstances, before entering into the contract of sale, he should satisfy himself as to the following points, viz.:

I. Is he a tenant for life, or a person having the powers of a tenant for life, for the purposes of the Settled Land Acts? If this question must be answered in the negative, the other points do not arise.

II. What estate has he power under the Acts to convey?

III. Are there trustees in existence for the purposes of the Acts? If not, such trustees must be appointed.

IV. Is the consent of the trustees necessary to the sale of the property?

It is proposed to consider these four points in detail.

SECTION 2.

WHO IS TENANT FOR LIFE.

Definition of Tenant for Life.—A tenant for life for the purposes of the Settled Land Acts is "the person who is for the time being under a settlement beneficially entitled *to possession of settled land for his life*" (*a*). If in any case there are two or more persons so entitled as *tenants in common* or as *joint tenants*, or for other concurrent estates or interests, they together constitute the tenant for life (*b*). "Settled land" means land or incorporeal hereditaments and any estate or interest therein which is the subject of a settlement (*c*); and the determination of the question whether land is "settled land" is governed by the state of facts, and the limitations of the settlement at the time of the settlement taking effect (*d*).

Settlement.—A "settlement" is defined as any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of Court Roll, Act of Parliament, or other instrument, or any number of instruments, under or by virtue of which any land, or any estate or interest in land, *stands for the time being limited to or in trust for any persons by way of succession* (*e*).

(*a*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2 (5). See *Re Carne's Settled Estates*, [1899] 1 Ch. 324. Possession includes receipt of income (s. 2 (8)).

(*b*) *Ibid.*, s. 2 (6).

(*c*) *Ibid.*, s. 2 (3), (10).

(*d*) *Ibid.*, s. 2 (4).

(*e*) *Ibid.*, s. 2 (1).

The words "stands limited to or in trust for any persons by way of succession" have no technical force, and are not restricted to freehold estates. They include the case of a jointure and portions for younger children limited to arise on or after the death of tenant for life (*f*), even in a case where the tenant for life is entitled to the remainder in fee simple (*g*).

A settlement which is constituted by more than one instrument is generally known as a *compound settlement*. A compound settlement may be constituted by a will and a deed (*h*), or by two or more deeds (*i*), or by a will or deed together with an Act of Parliament (*k*).

The definition of tenant for life which has been given above must be taken in connection with s. 63 of the Settled Land Act, 1882, which deals with trusts for the immediate sale of land. But the powers of a tenant for life under that section can only be exercised with the leave of the court (*l*), and in practice are seldom resorted to for the purpose of selling land (*m*).

Limited Owners with powers of Tenants for

(*f*) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 290, 291.

(*g*) *Re Marshall's Settlement*, [1905] 2 Ch. 325.

(*h*) *Re Mundy's Settled Estates*, [1891] 1 Ch. 399; *Re Byng's Settled Estates*, [1892] 2 Ch. 219.

(*i*) *Re Marquis of Ailesbury and Lord Iveagh*, [1893] 2 Ch. 345; *Re Mundy and Roper's Contract*, *supra*.

(*k*) *Vine* v. *Raleigh*, [1896] 1 Ch. 37. See COMPOUND SETTLEMENTS, s. 6, *post*, p. 119.

(*l*) Settled Land Act, 1884, s. 7 (1).

(*m*) As to what is a trust for sale within the meaning of these sections, see *Re Goodall's Settlement*, [1909] 1 Ch. 440; and *Re Wagstaff's Settled Estates*, [1909] 2 Ch. 201.

Life.—Section 58 of the Settled Land Act, 1882, extends the powers of a tenant for life to nine classes of persons having certain limited interests *in possession*, but who are not tenants for life within the above-mentioned definition. It has been held that this section only applies to persons possessing *beneficially* the estates or interests therein mentioned (*n*). The nine classes of persons who, although not strictly tenants for life have the powers of tenants for life, are as follows, viz.:

(i) A tenant in tail, including a tenant in tail who is restrained from barring the entail by special Act of Parliament (as in the case of the Shrewsbury and Abergavenny estates); but not including such a tenant in tail where the estate was purchased with money provided by Parliament in consideration of public services; as, for instance, the Wellington and Nelson estates.

(ii) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or any other event (*o*).

(iii) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under the Act shall bind the Crown (*p*).

(iv) A tenant for years determinable on life, not holding merely under a lease at a rent.

(*n*) *Re Jemmett and Guest's Contract*, [1907] 1 Ch. 629.

(*o*) See *post*, DEVISE, p. 163.

(*p*) See *post*, ENTAIL, p. 176. This does not apply to the tenant for life of a base fee (*Re Morshead's Settled Estates*, [1893] W. N. 180).

(v) A tenant *pur autre vie* not holding merely under a lease at a rent (*q*).

(vi) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate or by conditional limitation or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose (*r*). The case of a widow whose life interest is charged with the maintenance of her children has been held to be within this clause (*s*); but the clause does not apply to a person merely entitled to receive surplus rents from trustees who are in possession and managing the estates (*t*).

(vii) A tenant in tail after possibility of issue extinct (*u*).

(viii) A tenant by the curtesy (*v*), which is to be deemed to be an estate arising under a settlement made by his wife (*x*).

(ix) A person entitled to the income of land under a trust or direction for payment thereof

(*q*) See *post*, DESCENT, p. 156.

(*r*) *Cf. Re Paget's Settled Estates* (1885), 30 Ch. D. 161; *Williams* v. *Jenkins*, [1893] 1 Ch. 700; *Re Edwards' Settlement*, [1897] 2 Ch. 412.

(*s*) *Re Pollock*, [1906] 1 Ch. 146.

(*t*) *Re Baroness Llanover*, [1907] 1 Ch. 635.

(*u*) See *infra*, ENTAIL, p. 176.

(*v*) See *infra*, CURTESY, pp. 189, 190.

(*x*) Settled Land Act, 1884, s. 8.

to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy, or other event (*y*).

This clause does not apply to a terminable life interest, or to any interest taken under an intestacy although comprised in the settlement (*z*).

SECTION 3.

POWERS OF THE TENANT FOR LIFE.

Power to Sell.—Where the vendor is a tenant for life, or a person having the powers of a tenant for life, he may sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same (*a*). The sale may be made in lots, and either by auction or private contract, and the vendor may make conditions as to title, user of the land, mines and minerals, etc. (*b*).

The sale should be made at the best price that can reasonably be obtained (*c*), and the tenant for life should have regard to the interests of all parties entitled under the settlement (*d*); but a purchaser dealing in good faith will be conclusively taken to have given the best price that could reasonably be

(*y*) *Cf. Re Pocock and Prankerd's Contract*, [1896] 1 Ch. 302.

(*z*) *Re Baroness Llanover*, [1907] 1 Ch. 635.

(*a*) Settled Land Act, 1882, s. 3 (1).

(*b*) *Ibid.*, s. 4 (3)—(6).

(*c*) *Ibid.*, s. 4 (1).

(*d*) *Ibid.*, s. 53; *Re Hunt*, [1906] 2 Ch. 11.

obtained (e), and is not bound to inquire whether a valuation has been made (f).

Power to Execute Conveyances.—A tenant for life may give effect to any sale he may make under the Acts by conveying the land by deed, and such deed is effectual to pass the land which is the subject of the settlement (g), or the easements, rights, or privileges created, discharged from all the limitations, powers and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

(i) All estates, interests, and charges *having priority to the settlement* (h).

(ii) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money *actually raised* at the date of the deed (i).

(iii) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth or agreed so to be, before the date of

(e) Settled Land Act, 1882, s. 54.

(f) *Hurrell* v. *Littlejohn*, [1904] 1 Ch. 689.

(g) This includes a reversion in fee left in the settlor. See *Re Hunter and Hewlett*, [1907] 1 Ch. 46.

(h) This exception is practically rendered nugatory by recent decisions, which establish that, however often the estate has been disentailed and resettled, the series of deeds constitutes one compound settlement (*Re Phillimore's Estate*, [1904] 2 Ch. 460).

(i) As, for example, by mortgage of the property (*Re Keck and Hart's Contract*, [1898] 1 Ch. 624).

the deed, by the tenant for life, or any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life (*k*).

Tenant for Life cannot be Deprived of his Powers.—A prohibition or limitation in a settlement against the exercise by a tenant for life of his statutory powers is void (*l*), and so too is a contract by the tenant for life not to exercise such powers (*m*). The powers of a tenant for life are not assignable (*n*), but if a tenant for life sells or mortgages his life estate, he can only sell with the consent of the assignee (*o*). This provision, however, being for the benefit of the assignee, may be waived by him; and if the instrument of assignment contains a consent by the assignee beforehand, all the powers of the tenant for life under the Act remain (*p*). A separate consent is in any case sufficient, and the assignee need not, of course, concur in the conveyance (*q*). If a tenant for life assigns or charges his life estate by his marriage settlement, or by a deed of family arrangement, he can still sell without the consent of the assignees (*r*).

(*k*) Settled Land Act, 1882, s. 20 (2).

(*l*) *Ibid.*, s. 51.

(*m*) *Ibid.*, s. 50 (2).

(*n*) *Ibid.*, s. 50 (1).

(*o*) *Ibid.*, s. 50 (3).

(*p*) *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch., at p. 109.

(*q*) *Re Dickin and Kelsall*, [1908] 1 Ch. 213.

(*r*) Settled Land Act, 1890, s. 4.

If the tenant for life surrenders his entire life estate to the remainderman, it is probable that his powers are extinguished (*s*), under the doctrine of Merger, but this is not so if part only of his life estate is surrendered (*t*).

SECTION 4.

TRUSTEES FOR THE PURPOSES OF THE SETTLED LAND ACTS.

Who are Trustees.—The following persons are trustees for the purposes of the Settled Land Acts:

(1) The persons who are by the settlement declared to be trustees thereof for the purposes of the Acts (*u*).

(2) The persons, if any, who are for the time being under the settlement trustees with power of or power to consent to a sale of the settled land (*u*), or with future power of sale, or under a future trust for sale, or with power of consent to the exercise of such future power, and whether the power or trust takes effect in all events or not (*x*).

(3) The persons, if any, who are for the time being under the settlement trustees, with power of or upon trust for sale of *any other land* comprised in the settlement and subject to the same limitations as the land to be sold, or

(*s*) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 297; but *cf. Re Marshall's Settlement*, [1905] 2 Ch. 325.

(*t*) *Re Barlow's Contract*, [1903] 1 Ch. 382.

(*u*) Settled Land Act, 1882, s. 2 (8).

(*x*) Settled Land Act, 1890, s. 16 (2).

with power of consent to the exercise of such a power of sale (*y*).

(4) Trustees appointed upon summons by a judge in chambers under s. 38 of the principal Act.

Notice to be given to Trustees.—The tenant for life before exercising his power of sale, must give not less than one month's notice of his intention to the trustees and also to their solicitor (*z*), but a general notice is sufficient without specifying any specific sale which may be contemplated at the time (*a*), and the trustees may by writing waive notice in any particular case or generally, and may accept less than one month's notice (*b*).

The purchaser is not concerned to inquire whether due notice has been given (*c*).

The number of trustees must not be less than *two*, unless a contrary intention is expressed in the settlement (*d*).

Payment of Purchase-money.—The purchase-money may be paid into court or to the trustees at the option of the tenant for life (*e*), but in practice the latter course is generally adopted, and in that case the trustees must join in the conveyance in order to give the purchaser a receipt for the purchase-

(*y*) Settled Land Act, 1890, s. 16 (1); *Moore* v. *Bigg*, [1906] 1 Ch. 789.

(*z*) Settled Land Act, 1882, s. 45 (1).

(*a*) Settled Land Act, 1884, s. 5 (1).

(*b*) *Ibid.*, s. 5 (3).

(*c*) Settled Land Act, 1882, s. 45 (3).

(*d*) *Ibid.*, ss. 39, 45 (2).

(*e*) *Ibid.*, s. 22.

money (*f*). Whichever course is adopted, it is necessary that there should be trustees of the settlement in existence; and the purchaser, before completing, must ascertain that there are duly appointed trustees for the purposes of the Act (*g*), although, of course, the contract of sale is good notwithstanding the non-existence of trustees.

A tenant for life of settled land which is subject to a trust for sale exercisable after his death can be a trustee of the settlement for the purposes of the Settled Lands Act (*h*).

SECTION 5.

FUNCTIONS OF SETTLED LAND ACT TRUSTEES.

When Consent of Trustees required.—As a general rule, the trustees have nothing to do with the sale except to receive notice of the tenant for life's intention to sell, and to give a receipt for the purchase-money, although, if they consider the sale improvident, they have power to submit the matter to the court (*i*). They are not parties to the contract, and their consent is quite unnecessary, but if the purchase-money is to be paid to them they are made parties to the conveyance for the purpose of giving a receipt for it (*k*). To this

(*f*) Settled Land Act, 1882, s. 40.

(*g*) *Mogridge* v. *Clapp*, [1892] 3 Ch., at p. 400; *Re Fisher and Grazebrook's Contract*, [1898] 2 Ch. 660.

(*h*) *Re Jackson's Settled Estate*, [1902] 1 Ch. 258; *Re Davies and Kent's Contract*, [1910] 2 Ch. 35.

(*i*) Settled Land Act, 1882, s. 44.

(*k*) Even when the whole of the purchase-money is payable to a prior incumbrancer the trustees must be made parties to the conveyance in order to give a discharge to the purchaser by directing

rule, however, there are two important exceptions: (1) When the *principal mansion-house* on any settled land, together with pleasure-grounds, and park and lands usually occupied therewith, are to be sold, the consent of the trustees is necessary (*l*), unless the house is usually occupied as a farmhouse or the site of the house and pleasure-grounds and park and lands do not altogether exceed twenty-five acres; (2) when the tenant for life is himself the purchaser, in which case the trustees stand in place of the tenant for life as vendor (*m*).

SECTION 6.

COMPOUND SETTLEMENTS.

What Constitutes a Compound Settlement.—Reference has already been made to compound settlements, and it has been pointed out that in ascertaining what estates and interests the tenant for life can overreach by the sale, it is necessary to determine how the settlement is constituted, and that the settlement may be constituted by any number of instruments. There may, for instance, be—(1) a will or deed creating a strict settlement with the usual powers of jointuring and limiting terms for securing portions; (2) deeds charging jointures and portions in exercise of those powers; (3) a disentailing assurance reserving the usual joint power of appointment; and (4) a resettlement in exercise of such joint

payment to the incumbrancer (*Re Norton and Las Casas' Contract*, [1909] 2 Ch. 59).

(*l*) Settled Land Act, 1890, s. 10.

(*m*) *Ibid.*, s. 12.

power of appointment. This series of instruments, being all connected together, may be treated as one compound settlement. Thus, in *Re Marquis of Ailesbury and Ireagh* (n), it was held that the compound settlement was made up of a series of instruments beginning with a deed in the year 1796 and ending with a deed in the year 1885. There may at the same time be a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one of the deeds only (o). For example, if A., the tenant for life under the original settlement which forms the first of the series, is also tenant for life under the resettlement which forms the last of the series, he may either sell as tenant for life under the compound settlement, or under the original settlement alone, or under the resettlement (p). It has, however, been recently held that if the resettlement *restores* the old life estate, *i.e.*, if the life estate is in terms limited to A. "in restoration and by way of continuance and confirmation of his former life estate," A. cannot sell as tenant for life under the resettlement alone with the concurrence of incumbrancers who have priority to the resettlement (q). But the case does not decide that the vendor could not have sold under the original settlement alone if there had been trustees of the original settlement for the

(n) [1893] 2 Ch. 345; followed in *Re Phillimore*, [1904] 2 Ch. 460.

(o) *Re Mundy and Roper's Contract*, [1899] 1 Ch., at p. 295.

(p) *Re Lord Wimborne and Browne's Contract*, [1904] 1 Ch. 537.

(q) *Re Cornwallis-West and Munro's Contract*, [1903] 2 Ch. 150.

purposes of the Settled Land Acts, which in fact there were not (*p*).

If the sale is made under a settlement constituted by a series of instruments it is generally necessary to obtain the appointment by the court of trustees of the compound settlement so constituted (*r*). A mere declaration in the resettlement that trustees of that deed should also be trustees of the compound settlement has no efficacy (*s*), but if the parties to the resettlement have complete control over the property and restore the life estate under the original settlement, they can appoint the trustees under the original settlement to be trustees of the compound settlement (*t*). Where the tenant for life has assigned his estate by marriage settlement or deed of family arrangement although the deed of assignment is *deemed* to be one of the instruments creating the settlement (*u*), this is only for the purpose of excluding the operation of s. 50 of the principal Act, and there is no necessity to appoint trustees of a compound settlement (*x*).

(*r*) *Re Marquis of Ailesbury and Lord Iveagh*, [1893] 2 Ch., at p. 358; *Re Mundy and Roper's Contract*, [1899] 1 Ch., at p. 281.

(*s*) *Re Spencer's Settled Estates*, [1903] 1 Ch. 75.

(*t*) *Re Spearman*, [1906] 2 Ch. 502.

(*u*) Settled Land Act, 1890, s. 4.

(*x*) *Re Du Cane and Nettlefold's Contract*, [1898] 2 Ch. 96.

CHAPTER VIII.

SALES UNDER THE LANDS CLAUSES CONSOLIDATION ACT, 1845.

SECTION 1.

GENERAL SCHEME OF THE ACT.

Application of the Act.—When land is required for the purpose of a public undertaking such as a railway, waterworks, gas or electric lighting works and the like, the owner is commonly compelled to sell it by Act of Parliament. The compulsory taking of lands in these cases is regulated by the Lands Clauses Consolidation Act, 1845 (*a*), which is incorporated in the private or public Act authorising the acquisition of the land. Any Act which incorporates the Lands Clauses Act is referred to as the "special Act"; and the parties (whether company, undertakers, commissioners, trustees, corporations, or private individuals) by the special Act empowered to execute any works or undertaking are described as the "promoters of the undertaking."

The powers conferred by the Lands Clauses Act relate to the acquisition of land of any tenure, but

(*a*) 8 & 9 Vict. c. 18. The Act has been amended by the Lands Clauses Consolidation Act, 1860 (23 & 24 Vict. c. 106), the Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), the Lands Clauses (Umpire) Act, 1883 (46 & 47 Vict. c. 15), and the Lands Clauses (Taxation of Costs) Act, 1895 (58 Vict. c. 11).

there is no power to take incorporeal hereditaments apart from the land (*b*).

The Act is divided into groups of sections. Thus, ss. 6—15 inclusive relate to the purchase of land by agreement, and ss. 16—67 inclusive relate to the purchase of land otherwise than by agreement. In some cases the special Act excludes the provisions of the Lands Clauses Act which relate to the purchase and taking of land otherwise than by agreement, and in that event ss. 16—67 are not incorporated (*c*), but s. 68 (the compensation section) applies whenever lands are "injuriously affected" whether the sale is voluntary or by compulsion (*d*), and the later sections of the Act (ss. 69—152), if pertinent, are not thereby excluded (*e*).

SECTION 2.

PURCHASE BY AGREEMENT.

Power of Limited Owners to Sell.—The promoters may purchase by agreement, either from absolute owners or persons under disability, the lands authorised by the special Act to be taken and required for the purposes of that Act (*f*). The agreement must, of course, be in writing, so as to satisfy the requirements of the Statute of Frauds. Section 7 enables persons with limited interests in possession (other

(*b*) *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 5 De G. M. & G. 851.

(*c*) *Ferrar* v. *Commissioners of Sewers* (1869), L. R. 4 Ex. 227.

(*d*) *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437.

(*e*) *R.* v. *Lord Mayor of London* (1867), L. R. 2 Q. B. 292.

(*f*) Land Clauses Consolidation Act, 1845, s. 6.

than married women entitled to dower or lessees for life or years) to sell the land, and enter into all necessary agreements for that purpose, not only on behalf of themselves, but also "for and on behalf of every person entitled in reversion, remainder, or expectancy after them or in defeasance of the estates of such parties." A similar power is conferred on corporations, guardians on behalf of their wards, committees (*g*) on behalf of lunatics, and trustees, executors, and administrators on behalf of their *cestuis que trust*. This provision, however, does not enable a municipal corporation to sell without the approbation of the Local Government Board (*h*), nor can a committee sell without the sanction of the Court of Lunacy (*i*).

Although executors and administrators are enumerated among the persons empowered to sell, the legislature did not intend to give this power to an executor or administrator having no estate or interest in the land (*j*). Moreover, the provision as to trustees does not include *bare* trustees for persons who are *sui juris, e.g.*, a bare trustee for a woman who is entitled for her separate use free from restraint on anticipation (*k*). If the *cestui que trust* is himself competent to convey under the powers of the Act, he, and not the trustee, is the proper person to enter

(*g*) This does not include a quasi-committee under s. 116 of the Lunacy Act, 1890 (*Re S. S. B.*, [1906] 1 Ch. 712).

(*h*) Lands Clauses Consolidation Act, 1845, s. 15.

(*i*) *Re Taylor* (1849), 1 Macn. & G. 210.

(*j*) *Re Barrow-in-Furness Corporation and Rawlinson's Contract*, [1903] 1 Ch. 339.

(*k*) *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429.

into the contract (*l*), although if the trustee has the legal estate, he is a necessary party to the conveyance (*m*).

The sale may be made for a gross sum or in consideration of a rent-charge (*n*). If, however, the owner is a person under a disability, and has no power to sell except under the Lands Clauses Act, he is incapacitated from fixing the price for the land taken (*o*), but he may either agree to sell at the price to be fixed by two surveyors under s. 9, or he may contract to sell at a named price which is subsequently to be tested by surveyors (*p*).

By s. 9 it is provided that where the owner is under disability or incapacity, and has no power to sell except under the provisions of the Act, the purchase-money or compensation to be agreed upon shall not be less than shall be determined by the valuation of two practical surveyors, one to be nominated by the promoters and the other by the other party; and if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices shall upon the application of either party after notice to the other party for that purpose nominate.

The section also requires a *declaration in writing* to be annexed to the valuation by each of the surveyors

(*l*) *Re Pigott and the Great Western Rail. Co.* (1881), 18 Ch. D., at p. 149.

(*m*) *Lippincott* v. *Smyth* (1860), 29 L. J. Ch. 520.

(*n*) Lands Clauses Consolidation Act, 1860 (23 & 24 Vict. c. 106), ss. 1, 2.

(*o*) *Bridgend Gas and Water Co.* v. *Dunraven* (1885), 31 Ch. D. 221.

(*p*) *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429.

if they agree, or if not by the surveyor nominated by the justices, verifying the correctness of the valuation, and such declaration is essential to its validity (*q*).

It is conceived that this section applies to persons having limited interests, such as a tenant for life, but there is nothing to prevent the sale from being carried out under the Settled Land Acts, and this alternative course is usually adopted in order to save the expense of a valuation and of payment into court.

SECTION 3.

PURCHASE OTHERWISE THAN BY AGREEMENT.

Notice to Treat.—The first step which must be taken by the promoters, if they require to purchase lands under the compulsory powers of the Act, is to give notice to treat (*r*). This notice must be given (1) to all parties interested in such lands; or (2) to the parties enabled by the Act to sell or convey or release the same; or (3) such of the said parties as shall after diligent inquiry be known to the promoters. The notice must demand from such parties the particulars of their estate and interest in such lands and of the claims made by them for compensation (*s*), and must state the quantity and situation of the land proposed to be taken, a plan whereof is usually annexed. No party (*t*) can be required to sell a *part*

(*q*) *Bridgend Gas and Water Co.* v. *Dunraven*, *supra.*

(*r*) Lands Clauses Consolidation Act, 1845, s. 18; as to service of notice, see ss. 19, 20.

(*s*) As to compensation for damage in addition to the purchase price, see s. 63.

(*t*) This includes parties under disability and also lessees.

only of any house or other building or manufactory if such party is willing and able to sell the whole thereof (*u*); and a landowner who is served with a notice to treat for part (*v*) of his property can serve a *counter-notice* requiring the promoters to take the whole.

Effect of Notice.—The effect of the notice to treat is to fix the extent of the land to be taken and to place the promoters under a legal obligation to take and pay for such land, and it is in every case a necessary preliminary in the case of a compulsory purchase (*w*). Notice to treat cannot be withdrawn without the landowner's consent, unless a counter-notice is given by the landowner under s. 92 (*x*). But if the notice has been validly withdrawn, a fresh notice to treat may be given (*y*).

Although after notice has been given the parties stand in a position analogous to that of vendor and purchaser (*z*), yet their rights are only rights given by the Act, and any proceedings to enforce those rights must be taken under the Act. It is not until the purchase-money has been ascertained, either by agreement or by one of the methods which the Act provides, that the actual relation of vendor and purchaser, with all the rights and obligations incident

(*u*) S. 92. See *Barnes* v. *Southsea Rail. Co.* (1884), 27 Ch. D. 536.

(*v*) See Jepson, Lands Clauses Acts, 2nd ed., 273 *et seq.*

(*w*) *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. 480, at p. 503.

(*x*) *R.* v. *Hungerford Market Co.* (1883), 4 B. & Ad. 327.

(*y*) *Ashton Vale Iron Co., Limited* v. *Mayor of Bristol*, [1901] 1 Ch. 591.

(*z*) (1884), 9 App. Cas. at p. 489.

thereto, is established between the parties. Thus, after notice to treat, but before the price is fixed, no contract is arrived at which can be enforced by an action for specific performance (*a*), and if the owner dies, the purchase-money when ascertained will belong to his heir or devisee (*b*). On the other hand, when once the purchase-money has been fixed, the court will enforce specific performance of the contract (*c*). If the promoters go into possession before the purchase-money has been fixed, they will be liable to interest at £4 per cent. as from the time of their taking possession (*d*).

When Notice must be given.—Notice to treat must be given within the period prescribed by the special Act for the exercise by the promoters of their powers of compulsory purchase, or if no period is prescribed, within three years from the passing of the special Act (*e*). If, however, the notice is given within the three years, the machinery for completing a purchase may be set in motion and worked by either party after the three years have expired (*f*).

(*a*) *Adams* v. *London and Blackwall Rail. Co.* (1850), 2 Man. & G. 118; *Haynes* v. *Haynes* (1861), 1 Dr. & Sm. 426.

(*b*) *Haynes* v. *Haynes, supra; Re Battersea Park Acts* (1863), 32 Beav. 596.

(*c*) *Harding* v. *Metropolitan Rail. Co.* (1872), 7 Ch. 154.

(*d*) *Rhys* v. *Dare Valley Rail. Co.* (1874), L. R. 19 Eq. 93.

(*e*) Lands Clauses Consolidation Act, 1845, s. 123.

(*f*) *Tiverton and North Devon Rail. Co.* v. *Loosemore* (1884), 9 App. Cas. at p. 480.

SECTION 4.

FIRST METHOD OF CARRYING OUT THE PURCHASE OTHERWISE THAN BY AGREEMENT.

Compensation fixed by Jury.—The first method is that usually adopted by municipal corporations, who do not as a rule desire to take possession of the land until the amount of compensation has been ascertained.

If the compensation claimed does not exceed £50 (*g*), or the person claiming compensation is only a yearly tenant (*h*), the same is settled by two justices.

In other cases the proper course is for the promoters to give ten days' notice of their intention to cause a jury to be summoned, and in such notice to state what compensation they are willing to give (*i*). The person claiming compensation then has an option to have the amount of compensation settled by arbitration, but he must exercise this option by notice to the promoters before they have issued their warrant to the sheriff to summon a jury (*k*). If the party claiming compensation desires arbitration, the compensation is settled by arbitrators in the manner provided in ss. 25—37 of the Act, as amended by the Lands Clauses Umpire Act, 1883. If the party claiming compensation does not elect in favour of arbitration, the matter is settled by a jury in the manner

(*g*) Lands Clauses Consolidation Act, 1845, ss. 22, 24.
(*h*) *Ibid.*, s. 121.
(*i*) *Ibid.*, s. 38.
(*k*) *Ibid.*, s. 23.

prescribed by ss. 39—50, or by a special jury if either of the parties so desire (*l*).

A long series of authorities has conclusively established that the jury or arbitrator has no right to try a question of the claimant's title to the interest which he alleges; any such question must be raised in subsequent proceedings.

Absent Parties.—If the party entitled to compensation is abroad or cannot be found, the promoters are entitled to have the compensation assessed by a surveyor, to be nominated by two justices (*m*). If, however, the absent party is dissatisfied with the valuation of the surveyor, he can afterwards require the question of compensation to be submitted to arbitration (*n*).

SECTION 5.

SECOND METHOD OF CARRYING OUT THE PURCHASE OTHERWISE THAN BY AGREEMENT.

Compensation fixed by Surveyor.—The course which is adopted where the promoters desire immediate possession of the lands is as follows (*o*): The promoters apply to two justices, or, in the case of a railway company, to the Board of Trade (*p*), to have a surveyor appointed, and this surveyor determines what is, in his opinion, the value of the land as to

(*l*) Lands Clauses Consolidation Act, 1845, ss. 54—56.

(*m*) *Ibid.*, ss. 58—60.

(*n*) *Ibid.*, ss. 64, 65.

(*o*) *Ibid.*, s. 85.

(*p*) Railway Companies Act, 1867, s. 39.

which notice to treat has been given. The sum so ascertained is deposited by the promoters at the Bank of England to the account of the Paymaster-General. The promoters then give to the parties entitled to sell the land a bond with two sufficient sureties in a penal sum equal to the sum deposited, to secure payment of such compensation as may be eventually fixed, with interest thereon at 5 per cent.

Upon complying with these requisites, the promoters are entitled to enter upon and use the land; but although they cannot be ejected by the owner, they do not acquire the legal estate, and the owner has a lien on the land for the amount of the compensation and interest which may ultimately be found due to him (*q*).

The duty of taking steps for ascertaining the amount of compensation, is thrown upon the owner, and no power is given to the promoters to initiate proceedings for settling the amount (*r*).

Right of Owner to Arbitration or Jury.—Section 68 of the Lands Clauses Act gives the owner a short and simple remedy for compelling compensation from the promoters. If he desires to have the compensation settled by arbitration, and gives notice of his desire to the promoters, the compensation will, in that case, be settled by arbitration in the manner provided by ss. 25—37 of the Act. If, on the other hand, the

(*q*) *Wing* v. *Tottenham and Hampstead Junction Rail. Co.* (1868), 3 Ch. 740. Section 124 protects the rights of persons having an interest in the land, who are not obligees of the bond. See *Ex parte Midland Rail. Co.*, [1904] 1 Ch. 61.

(*r*) *Doe* d. *Armistead* v. *North Staffordshire Rail. Co.* (1851), 20 L. J. Q. B. 249.

owner desires to have the compensation settled by a jury, and gives notice of his desire to the promoters, they are bound within twenty-one days either to pay the amount he demands, or else to issue their warrant to the sheriff to summon a jury in the manner provided by ss. 39—57 of the Act. If the promoters fail to issue their warrant for a jury within twenty-one days they are liable to pay the amount of compensation claimed by the owner, and he can recover the same with costs by action in any of the superior courts.

SECTION 6.

PAYMENT OF THE PURCHASE-MONEY.

How Payment made.—When the owner is not entitled to sell or convey except under the provisions of the Lands Clauses Act or the special Act, then the purchase-money or compensation for damage is paid as follows:

(1) If such money exceeds £200, it must be paid into the Bank to the account of the Paymaster-General *ex parte* the promoters and in the matter of the special Act (*s*).

(2) If such money does not amount to £200 but exceeds £20, it can either be paid into the Bank or to two trustees to be nominated by the parties entitled to the rents and profits of the lands (*t*).

(*s*) Lands Clauses Consolidation Act, 1845, s. 69; Supreme Court Funds Rules, r. 39.

(*t*) *Ibid.*, s. 71.

(3) If such money shall not exceed £20, the same shall be paid to the parties entitled to the rents and profits of the lands for their own use and benefit; or in case of incapacity of such persons, the same money shall be paid for their use to their respective guardians, husbands, committees, or trustees (*u*).

SECTION 7.

CONVEYANCES.

Mode and Form of Conveyance.—Upon the deposit in the Bank of the purchase-money or compensation, all parties by the Act enabled to sell or convey lands shall, when required so to do by the promoters of the undertaking, convey the lands to them or as they shall direct, and in default thereof, or if the owner fail to adduce a good title to such lands to their satisfaction, it shall be lawful for the promoters, if they think fit, to execute a deed poll under their common seal if they be a corporation, or if they be not a corporation, under the hands and seals of the promoters or any two of them, containing a description of the lands in respect of which such default shall be made; and upon such deed poll being executed in the manner directed by the Act, all the estate and interest in such lands of or capable of being sold or conveyed by the party between whom and the promoters such agreement shall have been come to, or as between whom and the promotors such purchase or compensation shall have been determined, shall vest absolutely in the promoters, and as against such parties and all

(*u*) Lands Clauses Consolidation Act, 1845, s. 72.

parties on behalf of whom they are by the previous provisions of the Act enabled to sell and convey, the promoters of the undertaking shall be entitled to the immediate possession of such lands (*x*).

If the owner of such lands, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands or to the interest therein claimed by him to the satisfaction of the promoters, or if he refuse to convey such lands as directed by the promoters, or if any such owner be absent from the kingdom or cannot after diligent inquiry be found or fail to appear on the inquiry before a jury as therein provided, it shall be lawful for the promoters to deposit the purchase-money in the Bank (*y*). And upon such deposit it shall be lawful for the promoters, if they think fit, to execute a deed poll as provided for by s. 75 of the Act, which is to vest in the promoters all the estate in the lands described therein of the parties for whose use such purchase-money or compensation shall have been deposited (*z*).

Conveyances of lands to be purchased under the provisions of that or the special Act may be according to the forms in the schedules to the Act, or as near thereto as the circumstances of the case will admit, or by deed in any other form which the promoters of the undertaking may think fit; and conveyances made according to the forms in the schedule, or as near thereto as the circumstances of the case will admit,

(*x*) Lands Clauses Consolidation Act, 1845, s. 75.
(*y*) *Ibid.*, s. 76. (*z*) *Ibid.*, s. 77.

shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking, and shall operate to merge all terms of years attendant by express declaration or construction of law, and to bar all estates tail and all other estates, rights, titles, remainders, reversions, limitations, trusts and interests whatsoever in the said lands; but although terms of years be thereby merged, they shall, in equity, afford the same protection as if they had been kept on foot (*a*). Promoters taking land compulsorily, although they may be content to rest on their equitable title, are bound to accept a conveyance if required so to do by the vendor (*b*).

Every conveyance to the promoters of lands of copyhold or customary tenure is to be entered by the steward of the manor upon the court rolls; and upon payment of such fees as would be due to him on the surrender of the same lands to the use of a purchaser, he is to enrol the conveyance, and the conveyance, when so enrolled, is to have the effect in respect of such lands as if the same were of freehold tenure. Until, however, the lands are enfranchised by enrolment of the conveyance they continue subject to the accustomed fines, heriots and services (*c*); and fines payable on the deaths of the vendor and his successors before enrolment must be included in the compensation for enfranchisement (*d*).

(*a*) Lands Clauses Consolidation Act, 1845, s. 81.

(*b*) *Re Cary Elwes*, [1906] 2 Ch. 143.

(*c*) Lands Clauses Consolidation Act, 1845, ss. 95, 96.

(*d*) *Lord Leconfield* v. *London and North Western Rail. Co.*, [1907] 1 Ch. 38.

SECTION 8.

SPECIAL PROVISIONS OF THE LANDS CLAUSES ACT.

Incumbrances.—The Act also contains special provisions enabling the promoters to redeem mortgages on the lands taken (*e*), to release the lands from rent-charges (*f*), and to satisfy the rights of commoners over the waste of the manor (*g*). Provision is also made for the compensation of leaseholders, tenants from year to year, and tenants at will (*h*).

The Act also contains provisions enabling the promoters, upon the discovery at any time of the existence of outstanding estates or interests, the purchase whereof may have been omitted by mistake, to purchase the same compulsorily; and prescribes the manner in which the value thereof is to be estimated, and provides for the payment of the costs of litigation with reference to such lands (*i*).

Superfluous Lands.—The promoters are, within the time prescribed by the special Act, or, if no period be prescribed within ten years after the expiration of the time thereby limited for the completion of the works, to sell such lands as shall not be required for the purposes of the undertaking (*k*). Such super-

(*e*) Lands Clauses Consolidation Act, 1845, ss. 108—114.

(*f*) Ss. 115—118.

(*g*) Ss. 101—107.

(*h*) Ss. 119—122.

(*i*) Ss. 124—126.

(*k*) S. 127. This section is not incorporated in the Public Health Act, 1875, or in the Gasworks Clauses Act, 1871.

fluous lands, unless they be situate in a town (*l*), or be lands built upon or used for building purposes (*m*), are to be first offered to the person then entitled to the lands, if any, from which the same were originally severed, or, if he refuse, or for six weeks neglect to signify his wish to purchase the same, or cannot be found, then to other adjoining owners; and unless a sale be made either to such person or adjoining owners, the superfluous lands remaining unsold after such period are to vest in and become the property of the owners of the land adjoining thereto, in proportion to the extent of their lands respectively adjoining the same (*n*). But a company may contract for a sale of superfluous lands before having made the prescribed offers, and having subsequently made the same and had them refused may enforce the contract (*o*). The sale must be an absolute one; and if an option of re-purchase is reserved, the sale is void (*p*).

Implied Covenants for Title.—In every conveyance by the promoters the word grant shall operate as

(*l*) As to what are lands situate within a town within the meaning of this section (128), see *Elliot* v. *South Devon Rail. Co.* (1848), 5 Rail. Cas. 500.

(*m*) *London and South Western Rail. Co.* v. *Blackmore* (1870), L. R. 4 H. L. 610.

(*n*) Lands Clauses Consolidation Act, 1845, ss. 127—129. As to what are superfluous lands within the meaning of these sections, see *Betts* v. *Great Eastern Rail. Co.* (1878), 3 Ex. D. 182; *Great Western Rail. Co.* v. *May* (1874), L. R. 7 H. L. 283. The test is whether or not there is reason to believe that within a reasonable time the land will be required for the purposes of the undertaking.

(*o*) *London and Greenwich Rail. Co.* v. *Goodchild* (1844), 8 Jur. 455.

(*p*) *Ray* v. *Walker*, [1892] 2 Q. B. 88.

express covenants by the promoters with the grantees therein named, that they were seised in fee, for quiet enjoyment, for freedom from incumbrances by the promoters, and for further assurance (*q*).

SECTION 9.

COSTS.

Costs of assessing Compensation.—The provisions of the Lands Clauses Act with regard to costs are briefly as follows:

(1) In the case of an arbitration (*r*) or assessment by a jury (*s*), if the amount of compensation awarded is the same or less than the sum offered by the promoters, each side pays his own costs. If more is awarded, all costs are borne by the promoters.

(2) The costs of a valuation by a surveyor, in the case of absent parties, are always borne by the promoters (*t*).

(3) In the case of an arbitration demanded by an absent party who is dissatisfied with the surveyor's valuation, if the surveyor's valuation is upheld, all the costs are borne by such party; but if more is awarded than the valuation, the costs are borne by the promoters (*u*).

(*q*) Lands Clauses Consolidation Act, 1845, s. 132.

(*r*) *Ibid.*, s. 34.

(*s*) *Ibid.*, s. 51.

(*t*) S. 62.

(*u*) S. 67

(4) In all cases of moneys deposited in the bank, except when such moneys have been deposited by reason of the *wilful* (*i.e.*, capricious) refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, the costs are borne by the promoters (*x*).

Costs of Conveyance.—The costs of conveyances of lands purchased under the provisions of the Lands Clauses Act or special Act, are borne by the promoters, and such costs include all charges and expenses incurred on the part as well of the vendor as of the purchaser of all conveyances and assurances of any such lands and of any outstanding terms or interests therein and of deducing, evidencing, and verifying the title to such lands, terms, or interests (*y*).

Under this section (82) the costs of obtaining a vesting order under the Trustee Act; the costs of taking out administration to leaseholds (and also, it is presumed, to freeholds when the Land Transfer Act, 1897, applies); and the costs and fees payable on the admittance to copyholds of the vendor's heir are borne by the promoters (*z*). With respect, however, to the lord's fine on the admittance of the heir, different

(*x*) S. 80.

(*y*) S. 82.

(*z*) *Re London United Tramways Act*, 1900, [1906] 1 Ch. 534; Jepson, Lands Clauses Acts, 2nd ed., 252, 253.

considerations arise, and it has been held that the promoters are not liable (*a*).

This section (82) applies to the purchase of lands by agreement under the Act as well as to compulsory purchases.

The scale charge under Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act is inapplicable to sales under the Lands Clauses Act (*b*).

(*a*) *Re Thames Tunnel Act*, 1900, [1908] 1 Ch. 493.
(*b*) *Re Burdekin*, [1895] 2 Ch. 136.

PART III.

OF THE VENDOR'S TITLE.

CHAPTER IX.

THE ABSTRACT OF TITLE.

SECTION 1.

CONTENTS OF ABSTRACT.

What Title must be shown.—A contract for sale of land implies an agreement to make a good title to the property sold, and for this purpose the vendor is bound to deliver to the purchaser an abstract of his title, *i.e.*, a summary in writing of all the documents, facts, and events upon which his right to the property depends (*a*). Formerly a vendor of freehold or copyhold property was bound to deduce a title for a period of sixty years preceding the day of sale (*b*); but now the Vendor and Purchaser Act, 1874 (*c*), provides that,

(*a*) See Halsbury, Laws of England, tit. Sale of Land, 341, 343. It seems that a tenant in common purchasing of a co-tenant is entitled to an abstract of the general title (*Morris* v. *Kearsley* (1837), 2 You. & Coll. 139). As to the rule in case of a partner purchasing his co-partner's share of partnership leaseholds, see *Law* v. *Law* (1845), 9 Jur. 745.

(*b*) *Cooper* v. *Emery* (1844), 1 Phil. 388.

(*c*) 37 & 38 Vict. c. 78, s. 1.

on the completion of any contract of sale of land, made after December 31st, 1874, subject to any stipulation to the contrary in the contract, forty years (*d*) shall be substituted for sixty years, though an earlier title than forty years may be required in cases similar to those in which an earlier title than sixty years might, at the date of the Act, have been required.

By the Interpretation Act, 1889, in every Act passed after 1850, "land" includes messuages, tenements, and hereditaments, houses, and buildings of any tenure. No definition of land is to be found in the Vendor and Purchaser Act, but the word probably does not extend to incorporeal hereditaments (*e*), although it clearly includes rights and easements (*f*) which are appurtenant to the land sold (*g*).

Previous to the Vendor and Purchaser Act, 1874, if the property sold consisted of a term created within a period of sixty years preceding the date of the contract, the title of the lessor had to be deduced for such a period as with the title to the term from its creation, would make up a period of sixty years, unless the lease were granted by an ecclesiastical corporation (*h*); but it is now provided (*i*) that

(*d*) As to land registered with an absolute title, see *post*, p. 154.

(*e*) *Cf.* definition of "land" in Lands Clauses Act; *Pinchin* v. *London and Blackwall Rail. Co.* (1854), 5 De G. M. & G., at p. 851.

(*f*) An easement is not strictly an incorporeal hereditament. It is defined in Gale as "an incorporeal *right*," while Challis describes it as "an appurtenant right," and see *Re Brotherton's Estate*, [1907] W. N. 230. RIGBY, L.J., however, spoke of a right of way as an incorporeal hereditament (*Gardner* v. *Hodgson's Kingston Breweries Co.*, [1901] 2 Ch., at pp. 209, 217).

(*g*) *Jones* v. *Watts* (1890), 43 Ch. D. 574.

(*h*) *Fane* v. *Spencer* (1815), 2 Meri. 430 n.

(*i*) Vendor and Purchaser Act, 1874, s. 2, r. 1.

(subject to any stipulation to the contrary in the contract), under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.

Formerly, too, on the sale of an underlease, where there was a superior leasehold title, the title of the sub-lessor could be required, and, if it were of sufficient duration, carried back for a period of forty years, but now the Conveyancing Act, 1881, s. 3 (1), provides that under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

Since the Vendor and Purchaser Act, 1874, provides that earlier title than forty years may be required in cases similar to those in which an earlier title than sixty years might formerly have been required, on a sale of an advowson, the title must be carried back at least one hundred years, and a list of the presentations during that period should accompany the abstract (*k*).

The title to a reversionary interest also should be deduced from a sufficiently remote period to show its creation, and it must be shown that the estate has been enjoyed in accordance with the terms of the instrument creating it (*l*).

Again, on the sale of a lease more than forty years

(*k*) Dart, Vendors and Purchasers, 7th ed., 329; Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 30. *Cf.* Benefices Act, 1898, s. 1, which imposes restrictions on the sale of an advowson particularly by public auction.

(*l*) 1 Jarm. Conv. 61.

old the original lease sold must be abstracted together with the immediate title for the forty years next preceding the contract (*m*).

Lastly on the sale of property held under grant from the Crown (such as tithe rent-charge held by a lay proprietor) the title must commence with the original grant from the crown though the subsequent title need only be deduced for the forty years next preceding the contract (*n*).

Root of Title.—When it is said that a forty years' title must be deduced it must be understood that the abstract must, if necessary, go back further in order to arrive at a point at which the title can properly commence. It must commence *at or before* the forty years with something which is of itself, or which it is agreed shall be, a proper root of title (*o*). A purchaser who agrees to accept less than a forty years' title is affected with constructive notice of all such equities affecting the land as he would have discovered by reasonable inquiries under a title for the full period (*p*). But this rule, which has only recently been established, and is, it is submitted, a great extension of the doctrine of constructive notice, does not apparently apply to the

(*m*) See *Frend* v. *Buckley* (1870), L. R. 5 Q. B. 213; *Williams* v. *Spargo*, [1893] W. N. 100.

(*n*) *Pickering* v. *Lord Sherborne* (1838), 1 Craw. & D., Abr. 254. See as to all the foregoing exceptional cases, Halsbury, Laws of England, tit. Sale of Land, 342, and Williams, Vendor and Purchaser, Vol. I., 78.

(*o*) *Re Cox and Neve's Contract*, [1891] 2 Ch. 118.

(*p*) *Ibid.* and see *Re Nisbet and Pott's Contract*, [1906] 1 Ch. 386.

case of the transfer of a mortgage security (*q*). The best root of title is a mortgage or purchase deed, as such a document leads to the inference that, at the time of the execution thereof, the title must have been investigated, and in the case of a purchase deed the seisin of the predecessor in title is shown.

Neither a general devise by will, nor an appointment under a power, nor a disentailing deed is a proper root of title. In any case in which such an instrument was made the root of title the purchaser was formerly entitled to have the title carried back to the creation of the estate. This is now qualified by s. 3 (3) of the Conveyancing Act, 1881 (*r*), which provides that a purchaser shall not require the production or any abstract or copy of any deed, will, or other document dated or made before the time prescribed by law or stipulated for commencement of the title even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information or make any requisition, objection, or inquiry with respect to any such deed, will, or other document, or the title prior to that time, notwithstanding that any such deed, will, or other document or that prior title is recited, covenanted to be produced, or noticed. Nevertheless, such documents are not satisfactory roots of title.

A voluntary settlement is, it seems, a good root of

(*q*) *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch. 256.

(*r*) 44 & 45 Vict. c. 41. See *Re Lloyd's Bank and Lillington*, [1912] 1 Ch. 601.

title, provided that it is forty years old, but, as a rule, it is not a desirable one (s).

What Documents must be Abstracted.—Having selected the root of title, every subsequent document that forms a link in the vendor's title ought to be abstracted *in chief* (t); all circumstances affecting the title should be stated, and all incumbrances affecting the legal estate should be abstracted, whether such incumbrances have been discharged or not (u). It is not, however, necessary or usual to abstract expired leases (v).

The fraudulent concealment by the seller or his solicitor or agent of any settlement, incumbrance or other instrument material to the title, is, by statute, made a misdemeanour (w); but equitable charges which are intended to be paid off before completion need not be disclosed unless they are so framed that they may possibly affect the legal estate (x). Annuities, and *lis pendens*, should, speaking strictly, be mentioned in the abstract, though this is scarcely ever done in practice.

(s) *Noyes* v. *Paterson*, [1894] 3 Ch. 267; *Re Marsh and Earl Granville* (1883), 24 Ch. D., at p. 24; Dart, Vendors and Purchasers, 7th ed., 333; Williams, Vendor and Purchaser, Vol. I., p. 89. And see *post*, Chap. X., Sect. 8.

(t) *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 34; *Re Stamford, Spalding and Boston Banking Co. and Knight's Contract*, [1900] 1 Ch. 287.

(u) *Heath* v. *Crealock* (1874), 10 Ch. 22; *Drummond* v. *Tracy* (1860), John. 608.

(v) Dart, Vendors and Purchasers, 7th ed., 335.

(w) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 24, and Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 8.

(x) Dart, Vendors and Purchasers, 7th ed., 335—338.

Where property sold has been taken in exchange since the General Inclosure Act, 1845 (*y*), under an order of exchange, the title to the land given in exchange, becomes transferred to the land taken in exchange, and the purchaser is, therefore, in such a case entitled to have the title to the land given in exchange deduced to the date of the exchange, and subsequently the title to the land taken in exchange (*z*); but where the estate is taken under an exchange at common law, or by mutual conveyances, the abstract must to the time of the exchange show the title to the estate taken in exchange, as also to that given in exchange for it (*a*), unless in the case of a common law exchange the estate given in exchange has since been sold (*b*).

It is generally considered that where the property has been allotted under an Inclosure Act, the abstract down to the award must deduce the title to the lands in respect to which the allotment was made, and should the allotment have been made in respect of lands held under different titles, all of them must be deduced (*c*). This view would appear to be correct, since the commissioners have no jurisdiction to determine title (*d*). Where, however, a very considerable

(*y*) 8 & 9 Vict. c. 118, s. 147.

(*z*) *Minet* v. *Leman* (1855), 24 L. J. Ch. 548.

(*a*) *Bustard's Case* (1602), 4 Rep. 121; Sugden, Vendors and Purchasers, 372.

(*b*) Jarm. Conv. s. 75; but see the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 4.

(*c*) *Cattell* v. *Corrall* (1840), 4 You. & Coll. 228; and see the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 93.

(*d*) 8 & 9 Vict. c. 118, s. 49. The word "conclusive" in s. 105 means conclusive except as to title. See *Jacomb* v. *Turner*, [1892] 1 Q. B. 50.

time has elapsed since the award was made, the court will presume that it was valid (*e*).

Where land has been exonerated from tithe by an exchange under s. 30 of the Tithe Act, 1836, the title to the land given in exchange for the tithe must be shown (*f*).

When the property sold consists of renewable leaseholds, if the subsisting lease be expressed to be granted in consideration of the surrender of a prior one, it should be shown that the party surrendering was the equitable as well as the legal owner of the lease surrendered.

If the lease be held for lives, evidence must be given of the existence and correct ages of the *cestuis que vie*, even though there be a covenant for perpetual renewal (*g*).

Upon a sale of copyholds the title as it appears upon the court rolls should be deduced, as also the equitable title.

Where the sale is of enfranchised copyholds the purchaser has not got the right to call for the title of the lord of the manor to make the enfranchisement (*h*); but the title to the copyhold prior to enfranchisement must be deduced, unless the land was enfranchised more than forty years before the contract of sale (*i*).

(*e*) *Phillips* v. *Maille* (1830), 7 Bing. 147; *Bateman* v. *Boynton* (1866), 1 Ch. 359; *Micklethwait* v. *Vincent* (1893), 69 L. T. 57.

(*f*) Dart, Vendors and Purchasers, 7th ed., 325.

(*g*) *Anderson* v. *Higgins* (1844), 1 Jo. & Lat. 718.

(*h*) Conveyancing Act, 1881, s. 3 (2).

(*i*) Williams, Vendor and Purchaser, Vol. I., 81.

Articles for a settlement before marriage in pursuance of which a settlement has been made after marriage should be abstracted, in order that it may be seen that the articles were duly carried into effect (*k*).

As a general rule a purchaser is entitled to tracings of plans referred to in the abstracted deeds (*l*).

SECTION 2.

FORM OF ABSTRACT.

Method of preparing Abstract.—The abstract of title is usually written on brief paper with three inner margins. The outer margin should be left clear for the person investigating the title to insert any note or intended inquiry which may suggest itself as the perusal of the abstract advances—though it is sometimes necessary for the person preparing it to resort to the outer margin in order to insert a note or statement necessary for properly placing the title upon the abstract.

The abstract should commence with a heading written from the third margin, stating the name of the person whose title is proposed to be deduced, the tenure and situation of the property; and should the interest of such person consist of an undivided share or shares only in the estate, this circumstance should appear.

It frequently happens that an estate which has

(*k*) Prid. Conv., tit. Abstract.

(*l*) Dart, Vendors and Purchasers, 7th ed., 339; Williams, Vendor and Purchaser, Vol. I., 94, 95; and see *Blackburn* v. *Smith* (1848), 2 Ex. 783; and compare *Brown* v. *Wales* (1873), L. R. 15 Eq.. at p. 147.

been held as one property by successive owners, was originally purchased in several distinct portions at different periods under various titles, which, upon a sale of the entire estate, require to be disclosed. In such a case it will be found very convenient to prepare a distinct abstract in respect of each portion of the property so purchased, continuing such abstract down to the time such portion became dealt with as a part of the general estate, and confining the title to the general estate to one abstract.

Occasionally the title is rendered more complicated by the owner of the estate, or his predecessors in title, after having acquired portions of it, dealing with such portions in a manner differing from those subsequently acquired. In such a case it will be found convenient, where the length of title to each part will permit, to prepare one abstract embracing the titles thus separately dealt with, keeping each separate title distinct, and then follow it up with the general dealings with this particular portion of the estate down to the time when such estate was dealt with as a whole.

Where the titles to several properties are put upon one abstract, care should be taken to keep each title distinct; and it should be shown by proper headings throughout the abstract to what estate, or what particular portion thereof, the title is from time to time being deduced, thus—"As to the estate known as "; or "As to the hereditaments situate at ." Where the estate has become vested in tenants in common, or other part owners, their titles should be kept distinct, and should be denoted by headings, thus—"As to one-fourth share of G.H.,"

or as the case may be. And when the entire property has become subject to a general title, the subsequent dealings therewith should be placed under a heading, stating that what follows relates to the entire estate.

The documents should be abstracted in order of date—except that a will should be inserted immediately before the date of the testator's death. All facts and circumstances material to the title, such as deaths without issue, intestacies, etc., being noticed as they occur in like order.

It is usual to give the descriptions and additions of the parties to the documents, and the character in which they are parties, such as heir-at-law, personal representative, or otherwise, when they are so described—a very frequent addition in ancient deeds, though rarely met with in modern ones. It is usual for this portion of the abstract to be written from the outer margin.

Recitals are almost invariably written from the first inner margin, and should be given in the past tense, but in other respects *verbatim*, and should be confined to those affecting the title proposed to be deduced.

The abstract of the *testatum* is usually written from the outer margin. The consideration should be mentioned, and by and to whom paid. The acknowledgment of the receipt should also be stated. The leading operative words, such as "grant and convey," in a conveyance; "release," in an indenture of release; "exchange," in a deed of exchange; and "assign," in an assignment, should be mentioned, but it is usual to omit the accompanying operative words, as also those in the past tense, generally

met with in old deeds. In conveyances by lease and release, when the lease is referred to in the release, reference should also be made to it in the abstract. In deeds executed since the passing of the Conveyancing Act, 1881, the character in which the parties execute should also be stated, whether as beneficial owner, mortgagee, or the like.

The parcels are invariably set out from the third inner margin, and should be described *verbatim* from the first abstracted document containing them, with all exceptions and reservations; a mere statement of the existence of the clauses as to all the estate and all deeds will suffice. The parcels in a subsequently abstracted document, when they are precisely similar to those in the document, previously abstracted, should be described by reference to such previously abstracted document, as "The before-mentioned premises, by the description thereof contained in the abstracted indenture of the day of ."

The habendum, which is frequently written from the second inner margin, with the words limiting the use, should be fully set out. Where the estate is limited to uses to bar dower by the abstracting deed, such uses should be set out, and not a mere statement made that the estate is limited to the usual uses to bar dower.

Trusts by way of limitation of the estate must be abstracted in the same manner as limitations of the use, and powers acted upon or intended to be exercised should also be fully abstracted; so also should all provisoes for cesser of terms of years.

Powers, provisoes, and declarations are frequently written from the outer margin.

Covenants for title should be shortly stated, care being taken to mention any exception which may occur therein.

In the preparation of the abstract, care should also be taken, as far as possible, to anticipate the scrutiny the deeds will undergo when they are produced for comparison with the abstract, and with this view the names of the parties who have executed and signed receipts for consideration money should be mentioned, and any endorsements on such deeds referred to. It is not, however, usual in practice for the person preparing the abstract to mention therein the stamp duties impressed upon the abstracted documents.

SECTION 3.

COSTS OF ABSTRACT.

Vendor must bear cost of Abstract.—It is the duty of the vendor to furnish a perfect abstract at his own expense even though the title deeds are not in his possession. Sub-section 6 of s. 3 of the Conveyancing Act, 1881 (which at first sight seems to throw the expense on the purchaser), presupposes that the vendor has furnished a proper abstract of title, and only refers to those incidental circumstances which sometimes arise in the course of the investigation of the abstract (*m*). Thus, even when a purchaser is bound by express stipulation to get in an outstanding estate at his own expense, the vendor is nevertheless under an obligation to pay the expense of abstracting the title to such outstanding estate (*n*). When the

(*m*) *Re Johnson and Tustin* (1885), 30 Ch. D. 42.

(*n*) *Re Adam's Trustees and Frost*, [1907] 1 Ch. 703.

contract of sale stipulates that the purchaser shall be entitled to "free conveyances" this does not of itself absolve the vendor from his duty to furnish an abstract at his own expense. The usual condition, however, provides that the purchaser shall only be entitled to a free conveyance on condition that he foregoes the investigation of the title (o).

The Conveyancing Act, 1881, s. 3 (7), provides that on the sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title shall not have a right to more than one abstract of the common title except at his own expense.

The abstract when delivered will become the property of the purchaser on the purchase being completed; and he will be entitled to retain it until the purchase is vacated by consent, or is declared impracticable by a Court of Equity (p), in which case the abstract is to be returned, and no copy kept by the purchaser, lest it be kept for a mischievous purchase; and although the purchaser pays for the opinion, that ought, it should seem, for the same reason, to be returned with the abstract (q).

SECTION 4.

REGISTERED LAND.

Effect of Land Transfer Acts.—What has been said above is subject to qualification in the case of land the title to which has been registered at the Land

(o) *Re Pelly and Jacob's Contract* (1899), 80 L. T. 45.

(p) *Roberts* v. *Wyatt* (1810), 2 Taunt. 268.

(q) Sugden, Vendors and Purchasers, 11th ed., 447.

Registry under the Land Transfer Acts, 1875 and 1897 (*r*).

Under these Acts land may be registered with either absolute title, qualified title, or possessory title, or in the case of leaseholds with good leasehold title.

In the case of an absolute title the only abstract that the purchaser can require is—(1) a copy of the land certificate, or office copies of the entries on the register and registered plan; (2) copies or abstracts of documents expressly referred to therein; and (3) a statutory declaration as to the existence of matters which are declared by s. 18 of the Land Transfer Act, 1875, not to be incumbrances (*s*).

In the case of a qualified title, the purchaser is also entitled to an abstract of all estates and interests excluded from the effect of registration (*t*). Absolute and qualified titles are but seldom registered, owing to the trouble and expense involved, though the fees have been considerably reduced (*u*).

Where only a possessory title has been registered, it is conceived that the purchaser is entitled to the same abstract as in the case of unregistered land, that is to say, to a forty years' title prior to the sale, unless he is precluded by an express condition in the contract.

(*r*) 38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65.

(*s*) See Land Transfer Act, 1897, s. 16; Brickdale and Sheldon, 70.

(*t*) Brickdale and Sheldon, 32.

(*u*) Fee Order, 1903. By r. 36 of the Land Transfer Rules, 1903, it is provided that, after the supposed publicity of six years' previous registration with a possessory title, the examination on an application for registering an absolute title may be "modified in such manner as the registrar thinks fit."

CHAPTER X.

INCIDENTS OF TITLE.

HAVING endeavoured to show the nature of the title which the purchaser may call for, we proceed to consider the various incidents of title which suggest themselves on the investigation being entered upon.

SECTION 1.

DESCENT ON INTESTACY.

The Rules of Descent.—In the case of any person dying intestate since December 31st, 1897, his realty (other than copyholds) as well as his personalty is by s. 1 of the Land Transfer Act, 1897, vested in the administrator so soon as letters of administration are taken out (*a*). Prior to the grant, the legal estate is probably in the heir-at-law (*b*), but the grant of administration relates back to the time of the death of the intestate (*c*), and a good title cannot be made by the heir until administration has been taken out and the estate has been conveyed to him by the administrator under s. 3 of the Act. This, however, does not affect the beneficial interest in the property which is regulated by the common law and the Inheritance Act, 1833 (*d*).

(*a*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, see *ante*, p. 85.

(*b*) *John* v. *John*, [1898] 2 Ch. 576.

(*c*) *In the Goods of Pryse*, [1904] P. 301.

(*d*) 3 & 4 Will. 4, c. 106.

The rules of descent as to an estate in fee simple are as follows:

Rule 1. Inheritances shall lineally descend to the issue *in infinitum* of the last purchaser, who is defined by the Act to be the person last entitled to the land, unless it shall be proved that he inherited (*e*).

Rule 2. The male issue shall be admitted before the female.

Rule 3. Where there are two or more males in equal degree the eldest only shall inherit, but females altogether. Consequently, the issue of the eldest male would take, to the exclusion of the younger and his issue, the younger male and his issue taking to the exclusion of the females, who, on the death of the younger male without issue, would take in equal shares as coparceners. If one of two coparceners dies seised and intestate leaving a child, the whole of her share descends upon the child to the exclusion of the other coparcener (*f*), and this rule applies equally in favour of her more remote lineal descendants (*g*).

Rule 4. The lineal descendants *in infinitum* of a person deceased shall represent their ancestor.

Rule 5. On failure of issue the inheritance shall descend to the purchaser's nearest lineal ancestor.

Rule 6. The father and all the male paternal ancestors of the purchaser and their descendants shall inherit in preference to any of the descendants of such lineal ancestor and before any of the female paternal ancestors and their heirs; all the female paternal ancestors and their heirs before the mother or any of

(*e*) Inheritance Act, 1833, s. 1.

(*f*) *Cooper* v. *France* (1850), 14 Jur. 214.

(*g*) *Re Matson*, [1897] 2 Ch. 509.

the maternal ancestors on her or their descendants; and the mother and all the male maternal ancestors and her and their descendants before any of the female maternal ancestors or their heirs.

Rule 7. A kinsman of the half-blood shall be capable of being heir, and shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman when the common ancestor is a male, and next after the common ancestor when such common ancestor is a female.

Rule 8. The mother of the more remote male paternal ancestor and her heirs shall be preferred to the mother of a less remote male paternal ancestor and her heirs.

Rule 9. By the Law of Property Amendment Act, 1859 (*h*), ss. 19, 20, it is enacted that where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then in such case the land shall descend, and the descent shall thenceforth be traced from the person last entitled to the land as if he had been the purchaser thereof.

Intestates' Estates Act, 1890.—By the Intestates' Estates Act, 1890 (*i*), a slight variation is made in the rules of descent above stated. This Act only applies to the case of a man dying intestate after September 1st, 1890, leaving a widow but *no issue*. If the net value of the intestate's estate (real or personal) does not exceed £500, the widow is entitled exclusively; if it does

(*h*) 22 & 23 Vict. c. 35. (*i*) 53 & 54 Vict. c. 29.

exceed £500, she has a charge for that amount with interest thereon at 4 per cent. from the date of the death of the intestate; which charge is borne and paid in proportion to the values of the real and personal estates, respectively. "The widow takes the £500 out and out paramount to everything"; and the residue of the real and personal estate devolves in the usual manner (*k*). The Act does not apply to a case of *partial* intestacy (*l*).

Explanation of Rules of Descent.—From the foregoing it will be gathered, first, that the person last entitled to the inheritance, whether he obtained possession thereof or not, is the party from whom the descent is to be traced, provided he did not inherit. Such person is styled the purchaser, the legal signification of the word "purchase" being defined by Littleton to be—possession to which a man cometh not by descent (*m*). Section 3 of the Act provides that a devisee of real estate takes by purchase, even though he may be the heir of the testator (*n*), and this section applies to the case of a devise to the testator's "right heirs" (*o*).

Secondly, that the inheritance will descend to the issue of such person *in infinitum*, the descendant of a person deceased representing the ancestor, the eldest son and his issue taking before the younger sons and their issue, and the daughters taking in equal shares on

(*k*) *Re Charriere*, [1896] 1 Ch. 912.
(*l*) *Re Twigg's Estate*, [1892] 1 Ch. 579.
(*m*) Litt., s. 12.
(*n*) Inheritance Act, 1833, s. 3.
(*o*) *Owen* v. *Gibbons*, [1902] 1 Ch. 636.

failure of the issue of their brothers as coparceners, the share of each daughter descending to her respective heirs.

On the failure of the issue of the purchaser, the inheritance would go to his father, as the nearest lineal ancestor, before the brothers or sisters of the purchaser, who and whose issue would take after the father; the brothers and sisters of the whole blood to the purchaser taking before the brothers and sisters of the half-blood, the latter on the father's side taking next after the issue of the whole blood; and on failure of the issue of the father of the purchaser, the inheritance would continue to ascend thus: the grandfather, being the next lineal ancestor of the purchaser, would become entitled in preference to the uncles or aunts or their issue, who would take next after the grandfather of the purchaser, and so on until the male paternal lineal ancestors and their issue were exhausted.

On failure of the male paternal ancestors of the purchaser and their issue, the female paternal ancestors and their issue are next entitled, the mother of a more remote male paternal ancestor and her heirs taking before the mother of a less remote male paternal ancestor; thus the mother of the paternal grandfather and her issue are preferred to the father's mother and her issue.

On failure of the female paternal ancestors of the purchaser and their issue, the mother of the purchaser and her heirs become entitled to the inheritance.

PROPERTY TO WHICH THE RULES OF DESCENT DO NOT APPLY.

Copyholds.—In the absence of any local custom, *copyhold* lands are regulated by the ordinary law of inheritance above stated (*p*). But both copyholds and freeholds are subject to particular customs of descent which prevail in certain manors, cities, or districts.

Descent by Local Custom.—The custom of *gavelkind* still prevails in parts of Kent (*q*). By this custom the descent is to all the sons equally, and in default of sons, to all the daughters equally, and in default of children, to all the brothers equally. The custom extends to collaterals of every degree (*r*).

Borough-English is a custom occasionally to be found in lands held by burgage tenure within ancient boroughs, and also in a few manors. By this custom the descent is to the *youngest* son, to the exclusion of the other children.

Where there is a special custom as to descent, which is neither Borough-English nor gavelkind, and there is no person to answer literally the description contained in the words of the custom, the estate descends to the common law heir (*s*).

(*p*) Elton, Copyholds, 126. Equitable Estates in copyholds follow the rules of descent regulating the legal title. *Trash* v. *Wood* (1839), 4 My. & Cr. 324.

(*q*) The presumption in Kent is that land is of gravelkind tenure, unless it is shown to be disgavelled. See Robinson, Gavelkind, 5th ed., 52 *et seq*.

(*r*) *Re Chenoweth*, [1902] 2 Ch. 488.

(*s*) *Re Smart* (1881), 18 Ch. D. 165.

Estates Tail.—The descent of estates tail will be dealt with hereafter (*t*).

Estates pur autre vie.—Before concluding the discussion of descent, it is proposed to deal very briefly with the transmission of estates *pur autre vie*. If lands were given to A. for the life of B., then prior to the Statute of Frauds (*u*), on the death of A. during the lifetime of B., the estate went to the first person who took possession, who was known as the *general occupant*. If, however, the estate *pur autre vie* were limited to A. and his heirs, it descended on the death of A. to his heir as *special occupant*. It is to be observed, however, that the heir in such cases took as occupant, and not as deriving title through the original tenant *pur autre vie* (*v*). The Wills Act, 1837 (*x*), which repeals and re-enacts s. 12 of the Statute of Frauds, provides that an estate *pur autre vie* may be devised. If no devise be made thereof, the estate is chargeable in the hands of the special occupant as assets by descent. In case there is no special occupant, the estate passes to the executors and administrators of the tenant *pur autre vie* and is treated as personalty (*y*).

Chattel Interests.—Terms of years and other chattel interests in land descend to the next-of-kin

(*t*) See under sect. 3, *infra*.

(*u*) 29 Car. 2, c. 3, s. 12.

(*v*) *Northern* v. *Carnegie* (1859), 4 Drew. 587; *Re Barber's Settled Estates* (1881), 18 Ch. D. 624.

(*x*) 1 Vict. c. 26, ss. 3, 6.

(*y*) *Re Sheppard*, [1897] 2 Ch. 67; *Earl of Mount Cashell* v. *More-Smyth*, [1896] A. C. 158.

of the intestate in accordance with the rules regulating the devolution of personalty.

SECTION 2.

DEVISE.

What may be Disposed of by Will.—The Wills Act, 1837 (z), which came into operation on January 1st, 1838, enables every person to devise, bequeath, or dispose by will of all real and personal estate to which he shall be entitled at law or in equity, which would otherwise devolve upon the heir-at-law or customary heir of him, or if he became entitled by descent, to the heir of his ancestor, or upon his executor or administrator; and the power thereby given extends to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that being entitled as heir or devisee or otherwise to be admitted thereto, he should not have been admitted thereto, or notwithstanding that the same, in consequence of a want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if the Act had not been made; and also to estates *pur autre vie*, whether there should or should not be any special occupant thereof, and whether the same should be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same should be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests

(z) 1 Vict. c. 26.

in any real or personal estate, whether the testator might or might not be ascertained as the person or one of the persons in whom the same respectively might have become vested, and whether he might be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will: and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator might be entitled at the time of his death, notwithstanding that he might become entitled to the same subsequently to the execution of his will.

Wills of Infants and Married Women.—No will made by an infant is now valid (*a*). In cases to which the Married Women's Property Act, 1882 (*b*), does not apply, a married woman can only dispose of real property by will if it has been settled to her separate use, or if she has a testamentary power of appointment over it. A woman who was married before January 1st, 1883 (the date at which the above-mentioned Act came into operation), has full testamentary power over property to which her title, whether vested or contingent, and whether in possession or remainder, has accrued *since that date* (*c*). It must, however, be borne in mind in the case of women who died before December 5th, 1893, that a will made by a married woman was not effectual to dispose of property which she might acquire after the termination

(*a*) Wills Act, 1837, s. 7. (*b*) 45 & 46 Vict. c. 75.
(*c*) *Ibid.*, s. 5; *Re Bowen*, [1892] 2 Ch. 291.

of the coverture (*d*). Now, however, it is enacted by the Married Women's Property Act, 1893 (*e*), that s. 24 of the Wills Act (by virtue of which a will speaks from the death of the testator) "shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband."

Lastly, a woman who was married after January 1st, 1883, has power to dispose by will of all her property, whether the property belonged to her at the time of her marriage or was subsequently acquired (*f*).

A restraint on anticipation does not prevent a disposition by will (*g*).

Signature and Attestation.—No will is valid unless signed at the foot or end thereof by the testator, or by some person in his presence and by his direction, and which signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses must attest and subscribe the will in the presence of the testator, but no form of attestation shall be necessary (*h*).

(*d*) *Re Price* (1885), 28 Ch. D. 709; *Re Wylie, Wylie* v. *Moffat*, [1895] 2 Ch. 116.

(*e*) 56 & 57 Vict. c. 53, s. 3.

(*f*) Married Women's Property Act, 1882, s. 2.

(*g*) *Re Currey, Gibson* v. *Way* (No. 2) (1887), 56 L. T. 80; and *cf. Bates* v. *Kesterton*, [1896] 1 Ch., at p. 163.

(*h*) Wills Act, 1837, s. 9; *cf. Royle* v. *Harris*, [1895] P. 163 *In the Goods of Anstee*, [1893] P. 283; and see also Wills Act, 1852, 15 & 16 Vict. c. 24.

It is not necessary that the testator actually sign in the presence of the witnesses, or even in express terms acknowledge the will; an acknowledgment may be inferred from circumstances (*i*); but the signature or acknowledgment must be in the presence of both the attesting witnesses, both present at the same time before they attest the will (*k*).

Execution of Testamentary Powers.—No appointment made by will in exercise of a power is valid unless the same be executed in manner before required; and every will executed in manner before required is, so far as respects the execution and attestation thereof, a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other solemnity (*l*); but a power of appointment to be exercised by a writing under the hand and seal of the person exercising it, will not be well exercised by a will, though executed according to the formalities of the Wills Act, if it be not also sealed (*m*). Where the appointment was directed to be made by deed or instrument in writing, signed, sealed and delivered by the party executing it, the power was held to be well exercised by the will of the appointor, which was not expressed to be delivered, but stated in the attestation

(*i*) *Beckett* v. *Howe* (1869), L. R. 2 P. & M. 1; *In the Goods of Huckvale* (1867), L. R. 1 P. & M. 375; *Inglesant* v. *Inglesant* (1873), L. R. 3 P. & M. 172.

(*k*) *Wyatt* v. *Berry*, [1893] P. 5.

(*l*) Wills Act, 1837, s. 10.

(*m*) *West* v. *Ray* (1854), Kay, 392; *Taylor* v. *Meads* (1865), 34 L. J. Ch. 203.

clause to be signed, sealed, published, acknowledged and declared in the presence of the attesting witnesses (*n*); but a power of appointment by writing under hand or by will is not well exercised by a testamentary instrument unattested (*o*).

Wills of Foreigners.—Chattels real, as well as real estate, are *immobilia*, and are therefore governed by the *lex loci rei sitae*, and not by the *lex domicilii*. Whatever the domicile or nationality of the testator, a will is valid, so far as real or leasehold estate in this country is concerned, provided that it is in accordance with the formalities required by the Wills Act (*p*). On the other hand, although a will executed by a person domiciled in a foreign country according to the law of that country is admitted to probate in England, and is a valid execution of a testamentary power of appointment (whether general or special) over personal estate, such a will is ineffectual with regard to real estate or chattels real in this country, unless it complies with the requirements of the Wills Act (*q*). Lord Kingsdown's Act (*r*), which deals with wills made out of the United Kingdom by *British subjects*, does not affect real estate, but has been held to apply to leaseholds (*s*). Under this Act the will of a British subject may be admitted to probate if the same be made (1) according to the law of the place of

(*n*) *Smith* v. *Adkins* (1872), L. R. 14 Eq. 402.
(*o*) *Re Daly's Settlement* (1858), 25 Beav. 456.
(*p*) Dicey, Conflict of Laws, 523.
(*q*) *Pepin* v. *Bruyère*, [1900] 2 Ch. 504.
(*r*) Wills Act, 1861, 24 & 25 Vict. c. 114.
(*s*) *Re Grassi*, [1905] 1 Ch. 538.

execution; or (2) according to the law of the testator's domicile; or (3) according to the law then in force in that part of the King's dominions where the testator had his domicile of origin.

Attesting Witnesses.—The Wills Act provides that a devise or bequest to a person attesting the execution of a will or to his or her *husband or wife* shall be void, but such person shall be admitted as a witness (*t*). If, however, the will is re-published by a codicil referring to it, the devise in the will is good, unless the devisee also attests the codicil (*u*). Creditors are also good witnesses, though the will contains a charge for payment of debts (*v*); and the fact that he is appointed executor is not an objection to a witness (*x*); and the gift to a class as joint tenants, one of which is a witness, will not sever the joint tenancy, but the whole will go to the other members to the exclusion of the witness (*y*).

Revocation of a Will.—A will is revoked by the marriage of the testator (*z*), except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next-of-kin under the

(*t*) Wills Act, 1837, s. 15.
(*u*) *Anderson* v. *Anderson* (1872), L. R. 13 Eq. 381.
(*v*) Wills Act, 1837, s. 16.
(*x*) *Ibid.*, s. 17.
(*y*) *Young* v. *Davies* (1863), 2 Drew. & Sm. 167.
(*z*) Wills Act, 1837, s. 18.

Statute of Distributions. A will may also be revoked by writing executed in the same manner as a will, and declaring an intention to revoke, or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence by his direction, with the intention of revoking the same (*a*).

No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*b*); the provision, however, in the Wills Act does not affect the equitable rule treating property agreed to be sold as personalty (*c*), even though the devise be to a trustee upon trust for sale (*d*).

Will speaks from the Death.—Every will must be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if executed immediately before the testator's death, unless a contrary intention shall appear by the will (*e*). This section has been the subject of many decisions. Thus, a devise of all the lands whereof I am *now* seised has been held not to pass an estate acquired after the execution of the will (*f*); but

(*a*) Wills Act, 1837, s. 20. (*b*) *Ibid.*, s. 23.

(*c*) *Farrar* v. *Earl Winterton* (1842), 5 Beav. 1.

(*d*) *Gale* v. *Gale* (1856), 21 Beav. 349.

(*e*) Wills Act, 1837, s. 24.

(*f*) *Cole* v. *Scott* (1849), 1 Mac. & G. 518; and *cf. Re Portal and Lamb* (1885), 30 Ch. D. 50.

if the testator makes a codicil confirming the will subsequent to the acquisition of the estate, the estate will pass by the devise (*g*). The devise also of a house in which "A. now resides, with the appurtenances," was held to pass a piece of land subsequently purchased and attached to the house (*h*); and a devise of all the lands in a particular place has also been held to pass lands in that place subsequently acquired (*i*). It may now be taken as settled, that if a will contains a description of any kind of property, such a description must be held to include and apply to whatever property the testator has at the time of his death which answers to the description, unless a contrary intention appears by the will (*k*). It is, however, doubtful whether s. 24 applies to the exercise by will of a special power of appointment (*l*).

Gift over on Death without Issue.—By s. 29 of the Wills Act it is enacted that in a devise the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an *indefinite failure of issue*, shall be construed to mean a want or failure of issue *in the lifetime or at the death of such person*, and not an indefinite failure of such issue. This section does not affect the question

(*g*) *Re Champion*, [1893] 1 Ch. 101.
(*h*) *Re Otley and Ilkley Rail. Co.* (1865), 11 Jur. (N.S.) 818.
(*i*) *Lord Lilford* v. *Keck* (1862), 30 Beav. 300.
(*k*) *Re Bridger*, [1894] 1 Ch. 299.
(*l*) *Re Wells' Trusts* (1889), 42 Ch. D. 657.

whether the executory limitation over is to be construed as taking effect in the event of the devisee leaving no issue at his death, or in the event of his having had no issue during his lifetime. If the gift over is on death without children, the word "children" is usually construed as synonymous with "issue," but a devise of this kind does not give the children any interest by implication (*m*). Section 29 of the Wills Act must be read in connection with s. 10 of the Conveyancing Act, 1882, which provides that a limitation over of this character in an instrument coming into operation after December 31st, 1882, shall become void if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect. Thus, in the case of a devise to A. in fee, but in the event of his dying without issue over to B., if A. has a child who attains twenty-one, the estate of A. in the property becomes absolute and indefeasible.

Lapse.—Unless a *contrary intention* appear by the will, real estate comprised in a devise which fails by reason of the death of the devisee in the lifetime of the testator, or is otherwise incapable of taking effect, is included in the *residuary devise* (*n*) (if any) in the will (*o*). There are, however, two exceptions to this rule, viz.—(1) where the devise is

(*m*) *Scalé* v. *Rawlins*, [1892] A. C. 342.

(*n*) As to what is a residuary devise, see *Re Mason, Ogden* v. *Mason*, [1901] 1 Ch. 619.

(*o*) Wills Act, 1837, s. 25.

for an estate tail, in which case, if the devisee die in the lifetime of the testator leaving issue who would inherit under such entail, and any of such issue are living at the death of the testator, such devise does not lapse, but takes effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*p*); and (2) if the devisee, being a child or other issue of the testator, die in his lifetime leaving issue, any of whom are living at the testator's death (unless a life estate only has been given to the devisee), the devise takes effect as mentioned in the former case (*q*). But this last exception does not apply to a devise to children *as a class*, which will take effect in favour of the survivors in the event of either of the members of such class dying before the testator (*r*), nor does it apply to the exercise of a special power of appointment (*s*).

Effect of General Devise.—A general devise of real estate is construed to include any real estate which the testator may have power to appoint in any manner he may think proper (*t*); and it has been held that a general power of appointment given to the survivor of several persons has been well exercised by a residuary devise in the will of the survivor, executed during the joint lives of such survivor and another of the persons to whom the power was limited

(*p*) Wills Act, 1837, s. 32. (*q*) *Ibid.*, s. 33.

(*r*) *Browne* v. *Hammond* (1859), Johns. 210; *Re Harvey's Estate*, [1893] 1 Ch. 567.

(*s*) *Holyland* v. *Lewin* (1884), 26 Ch. D. 266.

(*t*) Wills Act, 1837, s. 27.

who predeceased (*u*). A gift of residue has also been held to pass not only property over which a testator had a power of appointment at the time of making his will, but also property over which he acquired a general power after the date of his will (*x*). This section of the Wills Act (27) does not apply to a special power of appointment. A *special*, *i.e.*, a limited power of appointment, is not exercised unless there is a reference to the power, or to property subject to the power, or some other indication of an intention to exercise it in the will; but slight indications of intention are now held to be sufficient, as, for example, the use of the word "appoint" when the testator has no other testamentary power (*y*).

Trust and Mortgage Estates.—A general devise formerly included the trust and mortgage estates of the testator, unless there was a contrary intention in the will, *e.g.*, a charge of debts and legacies (*z*), and still includes trust and mortgage estates of copyholds where the trustee or mortgagee has been admitted (*a*). But since the Conveyancing Act,

(*u*) *Thomas* v. *Jones* (1862), 2 John. & H. 475.

(*x*) *Stillman* v. *Weedon* (1848), 16 Sim. 26; but as to a special power, see *Re Haynes*, [1901] 2 Ch. 529.

(*y*) *Re Mayhew*, [1901] 1 Ch. 677. A power to appoint by deed or will may be released by the donee in his lifetime (*Re Radcliffe*, [1892] 1 Ch. 231); and so also may a power to appoint by will only (*Re Lyons and Caroll's Contract*, [1896] 1 I. R. 393). See also Conveyancing Act, 1881, s. 52; *Re Chisholm*, [1901] 2 Ch. 82.

(*z*) *Re Bellis' Trusts* (1877), 5 Ch. D. 504.

(*a*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88; *Re Mills' Trusts* (1887), 37 Ch. D. 312.

1881 (*b*), trust and mortgage estates in freehold property devolve to and become vested in the legal personal representatives of the trustee or mortgagee, *notwithstanding any testamentary disposition to the contrary.*

Devise without Words of Limitation.—Where real estate is devised without words of limitation, such devise will be construed to pass the whole estate or interest which the testator had power to dispose of by will, unless a contrary intention appears (*c*).

Devise to Trustees.—The estate taken by trustees under a devise to them in a will is regulated by ss. 30 and 31 of the Wills Act. The construction of these sections presents considerable difficulty, and it is believed that they were originally drafted as alternative provisions (*d*). The general rule is that the trustees take the whole fee simple—(1) where there is a clear intention to vest it in them, as, *e.g.*, a devise unto and *to the use* of the trustees and their heirs; and (2) where a fee simple is required in order to carry out the trusts of the will, *e.g.*, a trust to sell, lease, or mortgage, or to do or perform any other act which requires complete control of the property.

In other cases the trustees take only such estate as will enable them to perform the trusts confided to them, *e.g.*, an estate *pur autre vie* during the life of the tenant for life, or an estate in remainder after his decease. Thus a trust to pay the rents and profits

(*b*) 44 & 45 Vict. c. 41, s. 30.
(*c*) Wills Act, 1837, s. 28.
(*d*) See Underhill, Trusts, 224—242.

to A. during his life gives the legal estate to the trustees during the life of A.; but a trust to permit and suffer A. to receive and take the rents and profits gives A. a legal life estate (*e*). If the trust is to pay or permit and suffer A. to receive and take the rents and profits, the last expression prevails, and unless there is some context to the contrary, A. takes the legal estate during his life (*f*). An ultimate trust *to convey* the estate to B. after the death of A., gives the trustees a legal estate in remainder, even although A. took the legal estate during his life (*g*). On the other hand, if the ultimate trust is for B. absolutely (with no mention of conveyance), the trustees have no further duties to perform, and the legal estate on the death of A. vests in B. (*h*). It is, however, a convenient rule which has been established by the decision of the House of Lords in *Foxwell* v. *Van Grutten* (*i*), that "where there are *recurring occasions* for the exercise of active duties by the trustees, and no repeated devises to them to enable them to perform their duties, the legal estate if once in the trustees is to be deemed to be vested in them throughout, notwithstanding the direction in the meantime of what would, but for the recurring duties, be construed as uses executed in the beneficiaries."

Assent of Executors.—It should of course be borne in mind that in case of death after December 31st,

(*e*) See Underhill, Trusts, 228.

(*f*) *Doe* d. *Leicester* v. *Biggs* (1809), 2 Taunt. 109; *Re Adam's and Perry's Contract*, [1899] 1 Ch. 561.

(*g*) *Doe* d. *Noble* v. *Bolton* (1839), 11 A. & E. 188.

(*h*) *Re Lashmar*, [1891] 1 Ch. 258.

(*i*) [1897] A. C. 658.

1897, the legal estate in freeholds does not vest in the trustees or beneficial devisee, as the case may be, until the executors have assented to the devise (*k*).

SECTION 3.

ENTAIL.

Nature of Estates Tail.—The rule against perpetuities prevents the destination of an estate from being restricted for a longer period than a life or lives in being and twenty-one years afterwards, and also the period allowed for gestation if existing (*l*). If, however, the restriction on alienation is effected by limiting the estate to a living person for life, making the unborn children of such person tenants in tail, the rule does not apply; and such an estate, if left to itself, will devolve in a regular course of descent as long as the posterity of the tenant in tail continues.

The course of descent, however, seldom remains undisturbed for any length of time; the tenant in tail usually on the death of the tenant for life, if not before, availing himself of the power he possesses of placing the estate under his immediate control.

Entail how formerly Barred.—This object was, previously to the Act for the Abolition of Fines and Recoveries (*m*), attained by means of suffering a recovery or levying a fine.

A recovery not only barred the issue of the tenant

(*k*) 60 & 61 Vict. c. 65, ss. 1, 3, *ante*, p. 85.

(*l*) Fearne, Contingent Remainders, 430; *Cadell* v. *Palmer* (1833), 7 Bligh (N.S.) 202.

(*m*) Fines and Recoveries Act, 1833, 3 & 4 Will. 4, c. 74.

in tail, but also the persons entitled in reversion or remainder expectant on the determination of the estate tail; but it was necessary in the case of a recovery to obtain the concurrence of the immediate tenant of the freehold.

A fine, however, might be levied without such consent, and it would effectually bar the right of all issue inheritable under the entail (*n*); but on failure of such issue the reversioner or remainderman would become entitled, as their rights were not defeated by this species of assurance. The estate thus created was called a base fee.

How now Barred.—Both fines and recoveries were abolished in the year 1833. By the Fines and Recoveries Act, 1833, a tenant in tail in possession is enabled to bar the entail by deed enrolled in the central office of the Supreme Court (*o*) within six months after its execution (*p*). Unless a tenant in tail has barred the entail in his lifetime, he cannot devise the property by his will; but if the period of six months has not elapsed, the deed may be enrolled after the death of the tenant in tail (*q*).

An estate tail granted by the Crown as the reward of public services cannot be barred.

When there is a limitation *in tail special, e.g.*, to A. and the heirs of his body begotten by him on a particular wife, and the wife dies childless, the husband is known as a "tenant in tail after possibility of issue

(*n*) 1 Prest. Est. 437, 438.

(*o*) R. S. C., Order LXI. r. 9.

(*p*) Ss. 15, 41.

(*q*) *Whitmore Searle* v. *Whitmore Searle*, [1907] 2 Ch. 332.

extinct." The Act prohibits such a tenant in tail from barring the entail (r).

A disposition by a tenant in tail by way of mortgage, or for any other limited purpose, if duly enrolled, is an absolute bar to the extent of the estate created against all persons who under the Act can be barred, notwithstanding any intention to the contrary which may be expressed or implied in the deed (s).

Office of Protector.—The Fines and Recoveries Act introduced the office of *protector*, which generally exists during the continuance of those estates which precede an estate tail.

The protector may be appointed by the settlor under s. 32 of the Act; but, if not so appointed, it is necessary to have recourse to s. 22 in order to ascertain who is the protector. Section 22 enacts that if, at the time when there shall be a tenant in tail under a settlement, there shall be under the same settlement (*t*) any estate for years determinable on a life, or any greater estate (not being an estate for years), prior to the estate tail, then the owner of the prior estate or the first of such prior estates if more than one subsisting under the same settlement (*t*), or who would have been so if no absolute disposition thereof had been made, shall be the protector of the settlement, and shall, for the purposes of the Act, be deemed the owner of such prior estate, although the same may have been charged or encumbered, and

(*r*) Fines and Recoveries Act, 1833, s. 18. As to these cases, see *ante*, p. 112.

(*s*) Fines and Recoveries Act, 1833, s. 21.

(*t*) For definition of settlement, see s. 1.

although all the rents be exhausted or required for the payment of the incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner, or by his bankruptcy or insolvency, or by any other act or default of such owner. An estate by the curtesy in respect of such estate tail, or of any prior estate created by the same settlement, is to be deemed a prior estate, and a resulting use or trust to or for the settlor is to be deemed an estate under the same settlement (*u*).

The Act also provides for making each owner of an undivided share the protector of such share (*v*); so that if there are two tenants in tail, each may alone acquire the fee in his moiety by virtue of the statute (*x*). Where an estate is limited by a settlement by way of confirmation, or where the settlement merely has the effect of restoring the estate, such estate is, so far as regards the protector of the settlement, to be deemed an estate subsisting under such settlement (*y*); but a lease at a rent created or confirmed by a settlement does not make the owner of it the protector (*z*). Neither a woman in respect of dower (*a*); nor a bare trustee, executor, administrator or assign can be the protector; but where there is more than one estate prior to an estate tail, and the owner of any such prior estate is excluded by ss. 26, 27 from being protector, the person who,

(*u*) Fines and Recoveries Act, 1833, s. 22.
(*v*) *Ibid.*, s. 23.
(*x*) *Tufnell* v. *Borrell* (1875), L. R. 20 Eq. 194.
(*y*) Fines and Recoveries Act, 1833, s. 25.
(*z*) *Ibid.*, s. 26.
(*a*) *Ibid.*, s. 27.

if such estate did not exist, would be protector, will be such protector (*b*).

A settlor entailing lands is empowered to appoint any person or number of persons, not exceeding three, to be protector in lieu of the person who would have been the protector if there had been no such appointment (*c*); and on the death of one of the persons so appointed, the survivor can exercise the powers attached to the office (*d*).

Should the protector be a lunatic, the Lord Chancellor or other person for the time being entrusted with the care of lunatics, is the protector in the place of such lunatic (*e*).

Consent, How Given.—The usual course is for the assurance to be expressed to be made by the tenant in tail "with the consent hereby testified of the Protector," but it is probable that if the protector is party to the deed and executes it, this would be held to be sufficient (*f*). It would seem that the deed may be executed by the protector after the death of the tenant in tail provided that the execution is before enrolment. If the consent of the protector is given by a separate instrument, the consent must be clearly signified on the face of that deed, and it is provided by s. 43 that a separate deed must be executed either *on* or *before* the day on which the

(*b*) Fines and Recoveries Act, 1833, s. 28. (*c*) *Ibid.*, s. 32.

(*d*) *Re Bayley-Worthington and Cohen's Contract*, [1908] 1 Ch. 26.

(*e*) Fines and Recoveries Act, 1833, s. 33.

(*f*) Where the tenant in tail is himself the protector the mere execution of the disentailing deed is sufficient (*Re Wilmer's Trusts*, [1910] 2 Ch. 111).

assurance is made. A consent once given cannot be revoked (*g*).

Base Fee.—The effect of a disentailing deed duly enrolled, to which the protector is not a party, is to create a base fee (*h*), that is to say, an estate which is good against all persons who, by force of any estate tail vested in the person making the disposition, claim the lands entailed but which is not effectual against the remainderman.

If a tenant in tail makes an assurance to a third party without the consent of the protector, he may subsequently enlarge the base fee so created into a fee simple, under s. 19 of the Act, either after the protector's death or during his lifetime, with his consent (*i*).

Moreover, a base fee, conveyed to a third party who enters into possession of the property, is enlarged into a fee simple by the lapse of twelve years from the death of the protector (*k*). On the other hand, a conveyance in fee by a tenant in tail, otherwise than by deed enrolled, creates a *quasi-base fee* subject to be defeated by the entry of the issue in tail. It has the same effect as if the tenant in tail had merely granted away his life estate, and consequently the estate of the grantee is not enlarged into a fee simple

(*g*) Fines and Recoveries Act, 1833, s. 44.

(*h*) *Ibid.*, s. 34.

(*i*) *Bankes* v. *Small* (1887), 26 Ch. D. 716; and see *Re Drummond and Davie's Contract*, [1891] 1 Ch. 524.

(*k*) Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 6.

by his possession until twelve years *after the death of the grantor* (*l*).

Where the tenant in tail in possession has not conveyed away his rights, as in the last-mentioned case, but has allowed a trespasser to remain in possession of the property, the rights of the issue and remainder-man are barred after twelve years from the time such possession is taken (*m*).

Married Women.—A married woman, who is protector of a settlement, may consent to a disposition by the tenant in tail as if she were a *feme sole* (*n*), that is to say, a deed acknowledged is not required, but, unless her life estate is limited to her for her separate use or is made separate estate by the Married Women's Property Act, 1882, the concurrence of the husband is necessary (*o*). A married woman who is tenant in tail can only disentail by a deed acknowledged with the concurrence of the husband (*p*), unless she acquired a title to the entailed property after the passing of the Married Women's Property Act, 1882, or was married after that date (*q*). A married woman may bar an equitable estate tail although she is restrained from anticipation (*r*).

(*l*) *Morgan* v. *Morgan* (1870), L. R. 10 Eq. 99.

(*m*) Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 21, 22; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 9; *Murray* v. *Watkins* (1890), 62 L. T. 796.

(*n*) Fines and Recoveries Act, 1833, s. 45.

(*o*) *Ibid.*, s. 24; Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 3.

(*p*) Fines and Recoveries Act, 1833, s. 40.

(*q*) *Re Drummond and Davie's Contract*, [1891] 1 Ch. 524.

(*r*) *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288.

Copyholds.—Copyholds are within the Act; but a disposition of an estate at law is to be made by surrender, and of an equitable estate by surrender or deed. Where the consent is given by deed, it must be executed by the protector and produced to the lord of the manor at or before the time when the surrender is made by which the disposition is effected, and then entered on the court rolls. And if such consent is not given by deed it must be given to the person taking the surrender by which the disposition is effected (*s*).

Equitable tenants in tail of copyholds are empowered to dispose of their interests by deed, in the same manner as freeholds, and the deed must be entered on the court rolls; and if a protector consent by a distinct deed, such deed must be executed by the protector on or before the day or which the disposition is executed by the equitable tenant in tail, and must be entered on the court rolls of the manor (*t*).

An enfranchisement made to a tenant in tail in possession bars the entail (*u*).

A disposition by a tenant in tail of either legal or equitable estate in copyholds requires enrolment on the court rolls only (*x*), and must be entered on the court rolls within six months after its execution (*y*).

It has been doubted whether a mere declaration

(*s*) Fines and Recoveries Act, 1833, ss. 51, 52.
(*t*) *Ibid.*, s. 53.
(*u*) *Re Hart* (1889), 41 Ch. D. 547.
(*x*) Fines and Recoveries Act, 1833, s. 54.
(*y*) *Green* v. *Paterson* (1886), 32 Ch. D. 95.

of trust duly enrolled is a "disposition" within the meaning of the Act so as to bar an estate tail (*z*).

Bankrupts and Convicts.—The Bankruptcy Act, 1883 (*a*), empowers the trustee in bankruptcy to deal with any property to which a bankrupt is entitled as tenant in tail in the same manner as the bankrupt might have dealt with the same: and it is enacted that ss. 56—73 of the Fines and Recoveries Act shall extend to and apply to proceedings in bankruptcy under the Bankruptcy Act.

The trustee in bankruptcy of a tenant in tail can bar the entail, even after the decease of the bankrupt (*b*).

In the case of a convict the administrator appointed under the Forfeiture Act, 1870, has no power to bar the entail; but the convict, although he cannot alienate, may execute an effectual disentailing deed and thus enable the administrator to sell the fee (*c*).

SECTION 4.

DOWER.

Nature of Dower.—Dower is the estate of a widow in the freehold lands of a husband who has died intestate, and amounts to a life interest in one-third of the rents and profits. At common law dower only

(*z*) *Green* v. *Paterson* (1886), 32 Ch. D., at p. 108, *sed quære*.

(*a*) 46 & 47 Vict. c. 52, s. 56 (5).

(*b*) Fines and Recoveries Act, 1833, s. 65.

(*c*) *Re Gaskell and Walters' Contract*, [1906] 2 Ch. 1.

attached to a *legal* estate of inheritance in possession held either in severalty or in common (*d*). Dower in gravelkind land is one moiety of the rents and profits so long as the widow remains chaste and unmarried. The right to dower so far as regards women married since January 1st, 1834, is regulated by the Act to amend the law relating to dower (*e*).

When Widow Entitled.—The Dower Act provides that when a husband dies beneficially entitled to land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and equitable (*f*), shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land (*g*).

Where the husband has an estate in fee simple subject to an executory limitation over in certain events, the widow is entitled to dower, notwithstanding that the executory limitation has taken effect (*h*). The widow of a tenant in tail in possession is of course dowable, even although there be no issue.

Where a husband has been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered

(*d*) Co. Lit. 31 a.

(*e*) The Dower Act, 1833 (3 & 4 Will. 4, c. 105). The Act applies to gavelkind land (*Farley* v. *Bonham* (1861), 2 J. & H. 177).

(*f*) *Cf. Re Michell*, [1892] 2 Ch. 87.

(*g*) Dower Act, 1833, s. 2.

(*h*) *Smith* v. *Spencer* (1856), 4 W. R. 729.

possession thereof, she is entitled to dower out of the same although her husband has not recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced (*i*).

When Dower Barred.—The widow is not entitled to dower out of any land which shall have been absolutely disposed of by the husband in his lifetime or by his will (*k*), and all partial estates and interests, and charges created by any disposition or will of a husband, and all incumbrances, contracts, and engagements to which his land is subject or liable, are valid and effectual as against the right of his widow to dower (*l*). The right to dower is not effected by the unsecured debts of the husband, but a mortgage by the husband bars dower *pro tanto* (*m*).

The husband may also, either wholly or partially, deprive his wife of her right to dower by a declaration for that purpose made by him by any deed or by his will (*n*), which declaration, if contained in a conveyance, will be effectual even though the purchaser may not execute it (*o*). But in a case where a husband had purchased property before the year 1834, which was conveyed to him to the usual uses to bar dower (*p*),

(*i*) Dower Act, 1833, s. 3.

(*k*) *Ibid.*, s. 4; and see *Lacey* v. *Hill* (1875), L. R. 19 Eq. 346.

(*l*) Dower Act, 1833, s. 5.

(*m*) *Jones* v. *Jones* (1858), 4 Kay & J. 361.

(*n*) Dower Act, 1833, ss. 6—8.

(*o*) *Fairley* v. *Tuck* (1857), 27 L. J. Ch. 28.

(*p*) The method of conveying to uses to bar dower will be found explained in the 7th edition of this book at pp. 184 and 185. It is now omitted as being of only antiquarian interest.

and the conveyance contained a declaration that his present or any future wife should not be dowable, it was held that his widow, to whom he was married after January 1st, 1834, was entitled to dower (*q*).

If the husband devises land to his widow, out of which she would be dowable if the same had not been devised to her, her right to dower out of any of the lands of her husband is destroyed unless the will provide to the contrary (*r*). But a gift of personalty for the benefit of the widow, or of lands not subject to dower, will not defeat the right of the widow, unless a contrary intention be declared by the will (*s*). And the Dower Act provides, that nothing therein contained shall prevent a court of equity from enforcing any covenant or agreement entered into by the husband not to bar the right of his widow to dower out of his lands or any of them (*t*).

Dower is barred if the marriage be dissolved by a divorce "*a vinculo matrimonii*," but is not affected by a mere judicial separation, formerly known as a "divorce *a mensâ et thoro*" (*u*).

Dower is also barred by jointure (*x*); but such jointure must take effect in possession immediately on the death of the husband, and must be at least for the life of the wife (*y*), and may be made to the widow direct and not in trust for her, and it must appear by

(*q*) *Fry* v. *Noble* (1855), 20 Beav. 598; 7 De G. M. & G. 687; *Clarke* v. *Franklin* (1858), 4 Kay & J. 266.

(*r*) Dower Act, 1833, s. 9.

(*s*) *Ibid.*, s. 10. (*t*) *Ibid.*, s. 11.

(*u*) *Frampton* v. *Stephens* (1882), 21 Ch. D. 164.

(*x*) Statute of Uses (27 Hen. 8, c. 10), s. 4.

(*y*) Co. Lit. 36 b.

the deed creating the jointure to be in satisfaction of the whole dower (*z*). If the jointure be made after marriage, the wife may elect between her dower and her jointure; and if evicted from the jointure, she is entitled to fall back upon her dower (*a*), and where the jointure is relied on in bar of dower a satisfactory title to the jointure land must be shown (*b*).

Dower is subject to abatement in respect of the widow's charge of £500 imposed on the intestate's estate by the Intestates' Estates Act, 1890 (*c*).

The claim of a widow to dower is not barred by the Statutes of Limitations, but after twelve years relief will be refused her on the ground of laches (*d*).

Assignment of Dower.—A widow has no right to enter until dower is assigned to her, and is a trespasser if she enters before assignment, unless owing to the nature of the property an assignment *per metas et bundas* is impossible. Dower may be assigned in one or two ways, viz., "according to common right" in pursuance of a judgment at common law, or "against common right" by the voluntary assignment of the heir. In practice, however, an assignment *per metas et bundas* is obsolete (*e*).

(*z*) *Tinney* v. *Tinney* (1743), 3 Atk. 8.

(*a*) Statute of Uses (27 Hen. 8, c. 10), s. 7.

(*b*) Dart, Vendors and Purchasers, 7th ed., 539.

(*c*) *Re Charrière*, [1896] 1 Ch. 912; see *ante*, p. 159.

(*d*) *Williams* v. *Thomas*, [1909] 1 Ch. 713, overruling *Marshall* v. *Smith* (1864), 34 L. J. Ch. 189.

(*e*) See article in Law Times Newsp., Vol. CVIII., p. 581.

SECTION 5.

FREEBENCH.

Right of Widow in Copyholds.—Dower does not attach to copyhold lands; but somewhat similar in character is freebench, which is regulated by the custom of the manor of which the lands are holden. By the custom of most manors, the right to freebench does not attach until the decease of the husband (*f*), and consequently he has in his lifetime complete power over the estate independently of the wife's concurrence; and a contract for sale will be enforced against the wife if the husband die before the sale is completed (*g*).

Freebench usually consists of a life interest in a third of the lands, though it sometimes extends to a life interest in the entirety (*h*), and is paramount to the debts of the husband (*i*). The Dower Act does not apply to freebench (*k*).

SECTION 6.

CURTESY.

Nature of Curtesy.—Curtesy is the life estate to which a husband is entitled on the death of his wife in her lands of inheritance.

This right attaches in respect of such lands or tenements as a wife dies possessed of and of which

(*f*) 2 Watkins, Copyhold, 60.

(*g*) *Hinton* v. *Hinton* (1755), 2 Ves. 632; *Brown* v. *Raindle* (1796), 3 Ves. jun. 256.

(*h*) 1 Scriven, Copyholds, 89.

(*i*) *Spyer* v. *Hyatt* (1855), 20 Beav. 621.

(*k*) *Smith* v. *Adams* (1854), 5 De G. M. & G. 712.

she was actually seised in deed (*l*) during the coverture in fee simple or fee tail, or as tenant in common or in coparcenary, though not of land held in joint tenancy, or of a reversion or remainder which does not fall into possession during the coverture, and it also attaches to the equitable estates of the wife (*m*). But to entitle the husband to curtesy, there must have been issue of the marriage born alive during the life of the wife which might possibly have inherited the estate (*n*), and the marriage must not have been void, or avoided by a divorce (*o*).

Curtesy will also attach in respect of an equity of redemption (*p*) and to an estate limited to a wife for her separate use (*q*) if she dies intestate.

In the case of copyholds, curtesy is commonly allowed by the custom of the manor (*r*). In the case of gavelkind land, the curtesy is of a moiety only, but attaches even where there is no issue. This curtesy ceases on the re-marriage of the husband (*s*).

The Married Women's Property Acts do not deprive a husband of his rights as tenant by the curtesy on the death of the wife intestate (*t*).

(*l*) Seisin *in law* is converted into seisin *in deed* by an actual entry or act of ownership. See Watkins, Descent, 61. As to the effect of s. 33 of the Wills Act, 1837 (*ante*, p. 172), on the rule requiring seisin of the wife, see *Eager* v. *Furnivall* (1881), 17 Ch. D. 115.

(*m*) *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288.

(*n*) Co. Lit. 29 a.

(*o*) *Rennington* v. *Cole* (1617), Noy, p. 29.

(*p*) *Casborne* v. *Scarfe* (1737), 1 Atk. 603.

(*q*) *Roberts* v. *Dixwell* (1738), 1 Atk. 607.

(*r*) Watkins, Copyhold, 71.

(*s*) Co. Lit. 30 a. (*t*) *Hope* v. *Hope*, [1892] 2 Ch. 336.

SECTION 7.

POSSESSION.

Title under Statutes of Limitations.—In the consideration of title we have hitherto confined our remarks to title by purchase or descent, but there is another mode by which a title to property may be acquired, viz., possession, and such title is now regulated by the Real Property Limitation Act, 1833 (*u*), which came into operation on January 1st, 1834, and the Real Property Limitation Act, 1874 (*x*), which came into operation on January 1st, 1879 (*y*). These two Acts are to be read and construed together, except so far as the first-named Act is repealed by the latter (*z*).

After January 1st, 1879, the period within which an entry or distress can be made, or an action or suit brought to recover land or rent, is limited to twelve years from the right having first accrued to the person making such entry or bringing such action or suit, or to the person through whom he claims (*a*).

Adverse Possession.—The Real Property Limitation Act of 1833 abolished the old doctrine of Adverse Possession and *possessio fratris*. No person is to be deemed to have been in possession by reason of having made an entry; nor will a right be preserved by continual claim being made upon or near the land. The possession of the entirety by one of several

(*u*) 3 & 4 Will. 4, c. 27.
(*x*) 37 & 38 Vict. c. 57.
(*y*) *Ibid.*, s. 12.
(*z*) *Ibid.*, s. 9.
(*a*) *Ibid.*, s. 1.

coparceners, tenants in common, or joint tenants is not to be deemed the possession of all the persons entitled; nor is the possession of the younger brother or other relation of the heir to be deemed the possession of the heir (*b*).

Rent.—The word "rent," as defined by s. 1 of the Act of 1833, does not include a *conventional* rent reserved on a *lease for years* so as to extinguish the title of the lessor (*c*), but does include a tithe rent-charge in a lay impropriator or other rent-charge (*d*), and also quit-rent payable in respect of copyholds and customary freeholds (*e*).

The recovery of arrears both of conventional and other rents is limited to six years (*f*); but this probably does not affect the liability of the original lessee to be sued on the covenant in the lease (*g*).

ACCRUAL OF RIGHT OF ACTION.

The great difficulty in applying the Statutes of Limitations, is to ascertain when the right of action

(*b*) Real Property Limitation Act, 1833, ss. 10—13.

(*c*) *Grant* v. *Ellis* (1841), 9 M. & W. 113. The lessor's right can only be extinguished by payment of rent to a third party under s. 9 of the Act of 1833, not by mere non-payment of rent.

(*d*) *Irish Land Commission* v. *Grant* (1884), 10 App. Cas. 14; *Jones* v. *Withers* (1896), 74 L. T. 572.

(*e*) *Howitt* v. *Earl of Harrington*, [1893] 2 Ch. 497.

(*f*) Real Property Limitation Act, 1833, s. 42; *Conolly* v. *Gorman*, [1898] I. R. 20.

(*g*) See Darby and Bosanquet, Statute of Limitation, 199. The limitation for a specialty debt is twenty years under the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3.

under those statutes accrues. It is proposed for the purposes of this treatise to treat this point under eight rules or headings.

Rule 1: Dispossession.—"When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate, or interest claimed, have been in possession or in receipt of such rent, and shall, while entitled thereto *have been dispossessed*, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received" (*h*). Notwithstanding the express language of this section, it has been held that it is not sufficient that the original owner should have discontinued his possession. It is necessary, in order to extinguish his title, that there should have been actual exclusive possession for the statutory period by some one else (*i*). When there has been a *series* of trespassers, not one of whom has been in possession of the statutory period, but who *claim through one another*, the title of the original owner is barred (*k*). In the case, however, of possession by a series of *independent* trespassers, the owner is only barred if the possession is *continuous* (*l*), but if there is *an interval* between the termination of possession of one trespasser and

(*h*) Real Property Limitation Act, 1833, s. 3.

(*i*) *Agency Co.* v. *Short* (1888), 13 App. Cas. 793.

(*k*) *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1.

(*l*) *Willis* v. *Howe*, [1893] 2 Ch. 545.

the entry of the next, the right of action of the owner accrues afresh (*m*).

Rule 2: Reversion subject to a Written Lease for Years.—The right of a lessor to recover in ejectment accrues *at the determination of the lease* (*n*). It was decided in *Archbold* v. *Scully* (*o*) that time would not begin to run against a landlord upon rent being withheld, but only upon its being paid to another. Thus, a trespasser in possession may acquire a possessory title as against the lessee, and be entitled to continue in possession during the residue of the term, but the landlord will, nevertheless, have twelve years from the determination of the lease during which he may bring ejectment.

If, however, the lessee in possession pays the rent to some third party *wrongfully* (*p*) claiming to be entitled to such rent in reversion immediately expectant on the determination of the lease, and no payment in respect of rent is subsequently made to the person rightfully entitled thereto, the right of the lessor accrues "at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid" (*q*). It is essential that the third person should receive the rents *as for himself*, and if he merely collects

(*m*) *Solling* v. *Broughton*, [1893] A. C. 561.

(*n*) Real Property Limitation Act, 1833, s. 3; *Doe* d. *Davey* v. *Oxenham* (1840), 7 M. & W. 131.

(*o*) (1861), 9 H. L. Cas. 360.

(*p*) *I.e.*, without any real title, not necessarily without any improper intention. See *Williams* v. *Pott* (1871), L. R. 12 Eq. 149.

(*q*) Real Property Limitation Act, 1833, s. 9.

them as agent for whoever may eventually turn out to be the true owner, the person rightfully entitled may subsequently ratify this agency, and is not barred by the statute (r). A possessory title acquired by a trespasser as against the lessee does not vest the term in the trespasser so as to render him in effect an assignee of the lease (s). The term remains, it is conceived, in the lessee who has been ousted, but since he has lost all title by dispossession he cannot surrender the term so as to accelerate the landlord's right of re-entry (t).

Rule 3: Right of Reversioner where no Lease in Writing.—When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant from year to year or other period (u) *without any lease in writing*, the right of the person through whom he claims to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods or at the last time when any rent payable in respect of such tenancy shall have been received *which shall last happen* (x). If, however, the person in possession is not a tenant for any fixed period, but is merely a tenant at will, the right of the reversioner accrues either at the determination of such tenancy or

(r) *Lyell* v. *Kennedy* (1889), 14 App. Cas. 456, 457.

(s) *Tichborne* v. *Weir* (1893), 67 L. T. 635.

(t) *Walter* v. *Yalden*, [1902] 2 K. B. 304.

(u) This period cannot, of course, exceed three years.

(x) Real Property Limitation Act, 1833, s. 8,

at the expiration of one year next after the commencement of such tenancy (*y*). Consequently, if the tenancy is determined by notice to quit or otherwise, and a fresh tenancy at will is created, the reversioner's right of action accrues afresh (*z*).

Rule 4: Right of Persons entitled to Remainder.—The right of action of a person entitled in remainder accrues at the time at which his estate or interest vests in possession. Primâ facie a remainderman has twelve years from the time at which he becomes entitled in possession in which to bring his action. But if the person last entitled to any particular estate on which his interest is expectant has been out of possession for more than six years, the remainderman is barred after *six years* from the determination of the particular estate (*a*).

Rule 5: Persons under Disability.—If the person entitled is an infant or a lunatic, he has a further period of six years in which to bring his action from the time that he has ceased to be under disability or has died (*b*), but when time under the Statute of Limitations has once commenced to run against an owner who is under no disability, the running of the time is not interrupted by the disability of the owner's successor in title (*c*). Absence beyond the

(*y*) Real Property Limitation Act, 1833, s. 7.

(*z*) *Cf. Jarman* v. *Hale*, [1899] 1 Q. B. 994.

(*a*) Real Property Limitation Act, 1874, s. 2.

(*b*) *Ibid.*, s. 3.

(*c*) *Garner* v. *Wingrove*, [1905] 2 Ch. 233. A right of action which has once accrued is never *suspended* except in the case of an administration judgment or the compulsory winding-up of a company.

sea is not now a disability (*d*), and thirty years is the utmost allowance for disabilities in any case (*e*).

Rule 6: Acknowledgment.—When any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent *in writing* signed by the person in receipt of the profits of such land or in receipt of such rent, then the right of entry of the owner is deemed to accrue "at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given" (*f*). An acknowledgment in order to be effectual must be given before the twelve years or other statutory period has elapsed. The determination of the statutory limit will in every case extinguish the title of the original owner, and does not merely bar his right of action (*g*), and no subsequent acknowledgment can restore the title which has been extinguished by the statute (*h*).

Rule 7: As between Mortgagor and Mortgagee.—A mortgagor in possession is not deemed a tenant at will of the mortgagee for the purposes of the statutes (*i*), except where the mortgage debt has been paid off but no re-conveyance executed, in which case the legal estate of the mortgagee is extinguished after thirteen years (*k*).

(*d*) Real Property Limitation Act, 1874, s. 4.
(*e*) *Ibid.*, s. 5.
(*f*) Real Property Limitation Act, 1833, s. 14.
(*g*) *Ibid.*, s. 34.
(*h*) *Sanders* v. *Sanders* (1881), 19 Ch. D. 374.
(*i*) Real Property Limitation Act, 1833, s. 7 (proviso).
(*k*) *Sands* to *Thompson* (1883), 22 Ch. D. 614.

By the Real Property Limitation Act, 1837 (*l*), it is enacted that the mortgagee shall have twelve years from the "last payment of any part of the principal money or interest secured by such mortgage" in which to bring his action. This Act does not confer a new right of entry on the mortgagee where, *at the time of making the mortgage*, a man is in possession holding adversely to the mortgagor, and the statute has already begun to run in his favour against the mortgagor (*m*). As between mortgagee and mortgagor, however, and as against third parties whose possession commences *after* the date of the mortgage (*n*), although a legal mortgagee can bring ejectment the moment after the mortgage is executed, time does not run against him so long as any interest is paid. If the mortgagor remains in possession and no principal or interest in respect of the mortgage debt is paid, and no acknowledgment in writing given for a space of twelve years, the right of the mortgagee is barred both as regards the land and also as regards his action on the covenant (*o*). On the other hand, if the mortgagee goes into possession, the equity of redemption is absolutely extinguished at the end of twelve years from the time the mortgagee took possession, or from the last written acknowledgment (*p*).

(*l*) 7 Will. 4 & 1 Vict. c. 28.

(*m*) *Thornton* v. *France*, [1897] 2 Q. B. 143.

(*n*) *Ludbrook* v. *Ludbrook*, [1901] 2 K. B., at p. 100.

(*o*) *Sutton* v. *Sutton* (1882), 22 Ch. D. 511.

(*p*) Real Property Limitation Act, 1874, s. 7. See *Re Loveridge*, [1904] 1 Ch. 518. There is no allowance for disability in this section.

Rule 8: As between Trustee and Cestuis que Trust.—A *cestui que trust* in possession is not the tenant at will of the trustee for the purposes of the Statutes of Limitations (*q*). The possession of the *cestui que trust* is consistent with the title of the trustee, and will not operate to bar the trustee's title (*r*), and *e converso* the possession of the trustee is deemed to be the possession of the *cestui que trust*, so that time will not run against the *cestui que trust* even although the trustee accounts for the rents to a person not entitled (*s*). In the case of express trusts time will not run in favour of a trustee in possession against *cestuis que trust* until there has been a conveyance by the trustee to a purchaser for value, and then the right of action is deemed to have accrued only as against such purchaser (*t*). This section (25) must be construed as extending, in certain cases, the limit of time allowed by the preceding section, but not as in any way restricting it, so that time will not run against an equitable remainderman until his right to possession accrues (*u*). As between the *cestuis que trust* and third persons, as in the case of a stranger to the trust encroaching on the trust property and claiming adversely both to the trustee and the *cestuis que trust* (*x*), it is usually considered that if the rights of the trustees are barred, the *cestui que trust* are barred also.

(*q*) Real Property Limitation Act, 1833, s. 7 (proviso).

(*r*) Darby and Bosanquet, Statutes of Limitation, 356; *Warren* v. *Murray*, [1894] 2 Q. B. 648.

(*s*) *Lister* v. *Pickford* (1865), 34 L. J. Ch. 582.

(*t*) Real Property Limitation Act, 1833, s. 25.

(*u*) *Thompson* v. *Simpson* (1841), 1 Dr. & War. 459.

(*x*) *East Stonehouse* v. *Willoughby*, [1902] 2 K. B., at p. 335.

CONCEALED FRAUD.

Exclusion of Statute by Concealed Fraud.—The rules above stated as to the limitations to actions to recover land must be accepted subject to this reservation, that in cases of concealed fraud no length of time will bar the title of true owner.

Section 26 of the Real Property Limitation Act, 1833, which has received a very strict interpretation, deals with Concealed Fraud. In order to take a case out of the statute on this ground, the person bringing the action must show that he, or some person through whom he claims, has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action (*y*).

A bonâ fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time of making the purchase had no notice thereof, will not be affected (*z*); but this saving will not extend to a purchaser for value who contracted through an agent who was aware of the fraud, though the purchaser personally had no knowledge thereof (*a*).

IMPORTANCE OF THE STATUTES OF LIMITATIONS AS BETWEEN VENDOR AND PURCHASER.

Purchaser not bound to take Statutory Title.—The Statutes of Limitations do not affect the right of

(*y*) *Lawrance* v. *Norreys* (1890), 15 App. Cas. 210.
(*z*) Real Property Limitation Act, 1833, s. 26.
(*a*) *Vane* v. *Vane* (1873), L. R. 8 Ch. 383.

a purchaser under an open contract to have a forty years' title (*b*). In certain cases a possessory title acquired under the statutes has been forced on a purchaser (*c*); but having regard to the obvious difficulty of proving a *negative*, viz., that there never has been an acknowledgment in writing given to the original owner (*d*), it is very difficult for a vendor claiming merely by possession to make out a title without the aid of some special condition. Thus, even when a mortgagee has been in possession for over twelve years, and the equity of redemption is barred, it is more usual for the mortgagee to sell by virtue of his power of sale (*e*).

THE ACQUISITION OF PROFITS AND EASEMENTS BY PRESCRIPTION.

Title under Prescription Act.—The several lengths of uninterrupted enjoyment which will confer a title in respect of rights of common, ways and watercourses, and the use of lights and other easements, are regulated by the Prescription Act, 1832 (*f*).

Commons and Profits.—The Prescription Act provides that no claim to any right of common or other profit to be taken and enjoyed upon any land,

(*b*) *Cooper* v. *Emery* (1844), 1 Phil. 388; *Jacobs* v. *Revell*, [1900] 2 Ch., at p. 869; *Re Nisbet and Potts' Contract*, [1905] 1 Ch., at p. 401.

(*c*) *Scott* v. *Nixon* (1843), 3 Dr. & War. 388; *Games* v. *Bonnor* (1884), 33 W. R. 64; *Re Atkinson and Horsell's Contract*, [1912] 2 Ch. 1.

(*d*) *Cf. Re Alison* (1879), 11 Ch. D., at pp. 290, 295.

(*e*) *Ibid.*, p. 284.

(*f*) 2 & 3 Will. 4, c. 71.

except as in the Act provided, and except tithes, rent and services, shall be defeated after thirty years' enjoyment by showing that profit or benefit was taken or enjoyed at any time prior to such periods of thirty years; and when such right or profit shall have been enjoyed for sixty years, such right shall be deemed absolute and indefeasible, unless taken and enjoyed by some consent or agreement in writing (*g*).

Right of Way.—No claim to any way or other easement, or to any watercourse, or to the use of any water to be enjoyed over or from any land, shall be defeated after twenty years' enjoyment by showing the commencement prior to such period of twenty years; and when the same shall have been enjoyed for forty years, the right shall be deemed absolute and indefeasible, unless taken and enjoyed by some consent or agreement in writing (*h*).

Right to Light.—When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years *without interruption* (*i*), the right thereto shall be deemed absolute and indefeasible, unless shown to have been enjoyed by consent or agreement in writing (*k*). Inasmuch as by

(*g*) 2 & 3 Will. 4, c. 71, s. 1.

(*h*) Prescription Act, 1832, s. 2; *Gardner* v. *Hodgson's Kingston Breweries Co.*, [1901] 2 Ch. 198.

(*i*) *I.e.*, adverse obstruction and not mere discontinuance of user. See *Smith* v. *Baxter*, [1900] 2 Ch. 143.

(*k*) Prescription Act, 1832, s. 3; but this section does not bind the Crown: *Perry* v. *Eames*, [1891] 1 Ch. 658; *Wheaton* v. *Maple & Co.*, [1893] 3 Ch. 48. As to the nature of the right to light which has not been altered by the Act, see *Colls* v. *Home and*

s. 4 of the Act the interruption must be acquiesced in for a year, a right to light is in effect acquired after the expiration of nineteen years and one day. Until, however, the full twenty years have expired, the right is *inchoate*, and no injunction to restrain interference with this right will be granted (*l*).

It is not necessary that the building should have been occupied, or indeed fit for occupation, to entitle the owner to maintain an action for the obstruction of its lights (*m*); but a right to access of light to a house cannot be acquired under this section by the lapse of time during which the owner of the house or his occupying tenant is also the occupier of the land over which the right would extend (*n*).

Right to Air.—It has been held that s. 2 of the Prescription Act does not apply to access of air (*o*); but in the opinion of both Lord SELBORNE and Lord DAVEY it includes easements of every description (*p*). A right to have air come over a neighbour's land *in a particular channel, to a particular place*, may be established by immemorial user, and also, it would seem, under the Prescription Act (*q*); but in the

Colonial Stores, Ltd., [1904] A. C. 179; *Ambler* v. *Gordon*, [1905] 1 K. B. 417; *Higgins* v. *Betts*, [1905] 2 Ch. 210; *Jolly* v. *Kine*, [1907] A. C. 1; *Fear* v. *Morgan*, [1907] A. C. 425; *Ankerson* v. *Connelly*, [1907] 1 Ch. 678.

(*l*) *Bridewell Hospital* v. *Ward, Lock & Co.* (1893), 68 L. T. 212.

(*m*) *Courtauld* v. *Legh* (1869), L. R. 4 Ex. 126.

(*n*) *Ladyman* v. *Grave* (1871), L. R. 6 Ch. 763.

(*o*) *Webb* v. *Bird* (1861), 10 C. B. (N.S.) 268.

(*p*) *Simpson* v. *Godmanchester Corporation*, [1897] A. C., at p. 709.

(*q*) *Bass* v. *Gregory* (1890), 25 Q. B. D. 481.

absence of an actual contract, no one can claim a right to have a *general current of air* over his neighbour's property kept uninterrupted (*r*).

Interruption.—Each of the before-mentioned periods is to be deemed to be the period next before some suit or action wherein the claim, to which such period may relate, shall be brought in question, and no act shall be deemed an interruption within the meaning of the Act unless the same shall be *acquiesced in for one year* after the party interrupted shall have notice thereof (*s*); but in order to negative such acquiescence it is not necessary that the person interrupted should have taken any active steps to remove the obstruction, but it will be sufficient if he has in a reasonable manner communicated to the party causing the interruption that he does not acquiesce in it (*t*).

No presumption will be allowed in support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period than such period mentioned in the Act as might be applicable to the case and nature of the claim (*u*).

Provisoes for Persons under Disability and Reversioners.—The time during which any person,

(*r*) *Chastey* v. *Ackland*, [1895] 2 Ch. 389; [1897] A. C. 155; but see *Cable* v. *Bryant*, [1908] 1 Ch. 259, a case of derogation from grant.

(*s*) Prescription Act, 1832, s. 4; *Flight* v. *Thomas* (1841), 8 Cl. & F. 231; *Bridewell Hospital* v. *Ward, Lock & Co.* (1893), 68 L. T. 212.

(*t*) *Glover* v. *Coleman* (1875), L. R. 10 C. P. 108; see also *Smith* v. *Smith* (1875), L. R. 20 Eq. 500.

(*u*) Prescription Act, 1832, s. 6.

otherwise capable of resisting any claim, shall have been under disability shall be excluded in the computation of the periods before mentioned (*x*).

When land or water, upon or over which such way or watercourse shall have been enjoyed or derived, shall be held for any term exceeding three years from the granting thereof, the time of enjoyment during such term shall be excluded in the computation of the period of forty years, in case the claim shall within three years after the determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (*y*).

SECTION 8.

SETTLEMENTS.

Settlements are another incident of title to which reference should be made.

Settlements by Infants.—Persons who are competent to sell their property are competent to settle it (*z*), and further than this, infants, though not able to sell their property, can, under certain circumstances, make a valid settlement of it; for it is provided by the Infant Settlements Act, 1855 (*a*), that every infant not under twenty if a male, and not under seventeen if a female, may make a binding settlement on his or her marriage, with the sanction of the Court of Chancery; though an appointment under a power or a disentailing assurance executed by an infant

(*x*) Prescription Act, 1832, s. 7.

(*y*) *Ibid.*, s. 8.

(*z*) Atherley, Settlements, 11.

(*a*) 18 & 19 Vict. c. 43.

tenant in tail under the provisions of the Act, will if the infant should afterwards die under age, thereupon become absolutely void (*b*).

Under the Infant Settlements Act an infant can bind by the settlement a mere *spes successionis* in property (*c*); but a *voluntary* assignment of a *spes successionis* is void even when made by deed.

With regard to post-nuptial settlements, it should be remembered that the Act, although it removes the disability of infancy, does not remove the disability of coverture (*d*).

A settlement made by a *male* infant, or a settlement of *real* property by a *female* infant, if not confirmed by the court, is voidable on the infant coming of age; but repudiation must be made within a reasonable time (*e*). Before the Married Women's Property Act, 1882, the settlement by a *female* infant on her marriage of personalty (other than personalty limited to her separate use) was regarded as a limitation by her husband of his marital rights, and was therefore binding (*f*); and by a strained construction put upon s. 19 of that Act this is still the law with regard to settlements made before January 1st, 1908 (*g*).

With regard, however, to marriage settlements made after January 1st, 1908, the settlement is not binding (even as regards personalty) unless executed by the wife (if she is of full age) or confirmed by her

(*b*) 18 & 19 Vict. c. 43, s. 2; *Re Scott*, [1891] 1 Ch. 298.
(*c*) *Re Johnson*, [1891] 3 Ch. 48.
(*d*) *Seaton* v. *Seaton* (1888), 13 App. Cas. 61.
(*e*) *Edwards* v. *Carter*, [1893] A. C. 360.
(*f*) *Simson* v. *Jones* (1831), 2 Russ. & M. 365.
(*g*) *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307.

after she attains full age, or unless the wife dies an infant (*h*). When the intended wife is of full age and executes the settlement, it has been held that a covenant *by the husband alone* that the after-acquired property of the wife shall be settled, not saying by whom, is binding on such property, whether *real* or personal (*i*); and there is nothing in the new Act which affects this decision. Nor apparently does the new Act affect the decision in *Hancock* v. *Hancock* (*k*), viz., that a covenant by the husband that *he* will settle the wife's after-acquired personalty is effectual if the wife is adult and a party to the settlement.

Valuable Consideration in Settlements.—Marriage is a valuable consideration, and a settlement made previously to and in consideration of marriage, will, so far as concerns the interests of those whose claims are within the marriage consideration (viz., the husband and wife and their issue), be supported against both purchasers and creditors; and a settlement, though made after marriage, if made in accordance with articles executed previously to marriage, or of a covenant to bring in after-acquired property (*l*), or even in pursuance of a parol ante-nuptial contract recited in the settlement is not voluntary (*m*). Nor is a post-nuptial settlement voluntary if made for any valuable consideration other than marriage, such

(*h*) Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 2.

(*i*) *Re Haden*, [1898] 2 Ch. 220.

(*k*) (1888), 38 Ch. D. 78.

(*l*) A covenant to bring in all after-acquired property *except business assets* is not too vague to be enforced, and is not released by the bankruptcy of the covenantor (*Re Reis*, [1904] 2 K. B. 769).

(*m*) *Re Holland*, [1902] 2 Ch. 360.

as the payment of a portion; a covenant to indemnify the settlor against charges on the estate settled (n); or the advance of a sum of money to pay outstanding charges on the property (o). By s. 29 of the Bankruptcy Act, 1883, in case of a settlement made before and in consideration of marriage when the settlor is not at the time of the making thereof able to pay all his debts without the aid of the property comprised therein: if the settlor is adjudged bankrupt, or compounds or arranges with his creditors, and it appears to the court that such settlement was made to defeat or delay creditors, or was unjustifiable, having regard to the state of the settlor's affairs at the time it was made, his discharge may be suspended or refused, or the court may refuse to approve a composition or arrangement. These provisions, however, do not appear to render the settlement itself void or voidable.

A settlement, not made for a valuable consideration, is a voluntary settlement, and as such is liable to be defeated by creditors or bonâ fide purchasers for valuable consideration in certain events presently referred to; and trusts in a settlement made in contemplation of marriage in favour of the children of a future marriage or of collaterals are purely voluntary (p).

SETTLEMENTS VOID AGAINST CREDITORS OF THE SETTLOR.

I. Under 13 Eliz. c. 5.—By statute 13 Eliz. c. 5, the gift or alienation of any lands, tenements, or

(n) *Townend* v. *Toker* (1866), L. R. 1 Ch. 446; *Price* v. *Jenkins* (1877), 5 Ch. D. 619.

(o) *Bayspoole* v. *Collins* (1871), L. R. 6 Ch. 228.

(p) *Wollaston* v. *Tribe* (1869), L. R. 9 Eq. 44.

hereditaments, goods and chattels, made for delaying, hindering, or defrauding creditors, is made void as against such creditors, unless made upon good consideration and bonâ fide to a person not having at the time notice of such fraud.

The term "good consideration" in the statute means valuable consideration, such as money or marriage, and does not include a meritorious consideration, such as love and affection (q).

A bonâ fide purchaser of any interest under the deed impeached is protected, whether such interest be legal or equitable (r).

The mere circumstance that a settlement is voluntary will not render it void under the statute if it is not made with the object of defeating or delaying creditors (s); but in order to upset a voluntary settlement it is not necessary to prove an actual intent to defeat creditors if the settlement will necessarily have that effect, for there is then a presumption that it was made with that intent (t). On the other hand, in order to reach a settlement for value under the statute it must be shown that in fact the settlor intended to cheat his creditors and that the assignees had notice of it (u).

(q) *Copis* v. *Middleton* (1817), 2 Madd. 430.

(r) *Halifax Joint Stock Banking Co.* v. *Gledhill*, [1891] 1 Ch. 31.

(s) *Ex parte Mercer, Re Wise* (1886), 17 Q. B. D. 290; *Re Lane-Fox*, [1900] 2 Q. B. 508.

(t) *Freeman* v. *Pope* (1870), L. R. 5 Ch. 538.

(u) See *Columbine* v. *Penhall* (1853), 1 Sm. & Giff. 228; *Re Pennington* (1888), 59 L. T. 774; *Godfrey* v. *Poole* (1888), 13 App. Cas., at p. 503; *Re Poppleton and Jones' Contract* (1896), 74 L. T. 582; *Re Carl Hirth*, [1899] 1 Q. B. 620; *Gonville's Trustee* v. *Patent Caramel Co., Ltd.*, [1912] 1 K. B. 599.

II. Under s. 4 of the Bankruptcy Act.—By s. 4 (1) (b) of the Bankruptcy Act, 1883, it is enacted that a debtor commits an act of bankruptcy if in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property or *any part thereof*. The effect of this is, that if a bankruptcy petition is presented within three months of this fraudulent conveyance, and the debtor is eventually adjudicated bankrupt, the title of the trustee will relate back so as to defeat the transaction (*x*). To some extent this provision extends the statute of Elizabeth, but even in this case it is necessary to prove that there was collusion on the part of the assignee, otherwise a conveyance for valuable consideration will be protected by s. 49 (*y*) if it takes place before the date of a receiving order and the assignee has no notice of a prior act of bankruptcy. Although, however, the original assignee who takes from the debtor may be protected by s. 49, yet, if the original assignee had notice of an act of bankruptcy, or by reason of collusion or otherwise cannot avail himself of s. 49, there is no provision in the Bankruptcy Acts which protects a bonâ fide purchaser without notice who claims through such assignee (*z*).

By s. 4 (1) (c) of the Act, read with s. 48, a conveyance or transfer of property to a *creditor* of the bankrupt, made within three months before the presentation of the petition, with a view to giving such creditor a preference over the other creditors, is an act

(*x*) See Bankruptcy Act, 1883, ss. 43, 44, 54; *Re Carl Hirth*, [1899] 1 Q. B. 621, 622.

(*y*) *Shears* v. *Goddard*, [1896] 1 Q. B. 406.

(*z*) *Re Slobodinsky*, [1903] 2 K. B. 517.

of bankruptcy, and void as a fraudulent preference. The rights of any person making title in good faith and for valuable consideration *through or under the creditor* are not affected by the fraudulent preference (*a*), but inasmuch as s. 49 does not apply to a fraudulent preference, it would seem that the *creditor himself* is in no case protected.

III. Under s. 44 of the Bankruptcy Act.—Section 44 (2) (ii), of the Bankruptcy Act, when read with s. 54, empowers the trustee in bankruptcy to exercise all such powers in or over or in respect of property as might have been exercised by the bankrupt *for his own benefit.* A power of revocation reserved to the settlor by a settlement may therefore be exercised by his trustee in bankruptcy (*b*); but it is doubtful whether the trustee can release a limited power of appointment (*c*).

IV. Under s. 47 of the Bankruptcy Act.—Section 47 of the same Act provides that a *voluntary* settlement shall, if the settlor becomes bankrupt within *two years* after the date of the settlement, be void as against the trustee in bankruptcy, and shall if the settlor becomes bankrupt within *ten years* after the date of the settlement, be void against such trustee, unless the parties claiming under it can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee on

(*a*) Bankruptcy Act, 1883, s. 48 (2).
(*b*) *Ex parte Tarn* (1893), 9 T. L. R. 489.
(*c*) *Hasluck* v. *Rose*, [1905] 1 Ch. 94.

the execution thereof. The word "void" used in this section should be construed as "*voidable*," so that a bonâ fide purchaser for value without notice from the donee or trustees of the settlement whether prior (*d*) or subsequently to (*e*), the accrual of the title of the trustee in bankruptcy is protected.

It must be borne in mind that, if the settlor is dead, a settlement cannot be upset in administration proceedings under s. 125 of the Bankruptcy Act (*f*).

SETTLEMENTS VOID AGAINST PURCHASERS.

Under 27 Eliz. c. 4.—The 27 Eliz. c. 4, which does not apply to purely personal property, though it extends to chattels real (*g*), provides that conveyances of any estate in lands, tenements, or other hereditaments, made with the intent to defraud purchasers, and conveyances of such estate made with any clause of revocation at the will of the grantor, are void against subsequent purchasers for value. By a forced and arbitrary construction of this statute, it was held, prior to June 29th, 1893, that all *voluntary* conveyances were void as fraudulent as against subsequent purchasers for value from the settlor. Thus a voluntary settlor could defeat a settlement of real property by a subsequent sale, or could defeat it *pro tanto* by a mortgage, whether legal or equitable, and it made no difference that the purchaser or mortgagee had notice of the settlement (*h*).

(*d*) *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776.

(*e*) *Re Hart, Ex parte Green*, [1912] 3 K. B. 6.

(*f*) *Re Gould* (1887), 19 Q. B. D. 92.

(*g*) Co. Lit. 3 b.

(*h*) See *Ellison* v. *Ellison* (1802), Wh. & Tu., L. C. Eq., 8th ed., Vol. II., 853, and notes thereto, 884 *et seq.*

With regard to *leaseholds*, however, it was held (*i*), that the liability to pay rent and perform covenants undertaken by the assignee was sufficient consideration to prevent the settlor from availing himself of the provisions of 27 Eliz. c. 4, although it is insufficient to support a settlement in case of bankruptcy. Moreover, it was held (*k*), that if the trustees of a voluntary settlement sold the property to a purchaser for value, the settlement was confirmed, and could not subsequently be overridden by the settlor. Nor could a settlement be defeated under the Act after the death of the settlor.

By the Voluntary Conveyances Act, 1893 (*l*), it is enacted that no voluntary conveyance, if in fact made bonâ fide, shall hereafter be deemed fraudulent within the meaning of 27 Eliz. c. 4, by reason of any subsequent purchase for value. By s. 3 an exception is made with regard to sales by voluntary settlors before June 29th, 1893. If, however, the title deeds are in the hands of the voluntary donee, and he is in possession of the property, it may now be fairly assumed that there is no purchaser who claims under an assurance by the settlor made before the Voluntary Conveyances Act; although the right of such purchaser being legal and not equitable, it is assumed that laches would be no defence to an action by him (*m*).

(*i*) *Price* v. *Jenkins* (1877), 5 Ch. D. 619.

(*k*) *Prodgers* v. *Langham* (1662), 1 Sid. 133.

(*l*) 56 & 57 Vict. c. 21, s. 2.

(*m*) *Noyes* v. *Paterson*, [1894] 3 Ch. 270; *Re Maddever* (1884), 27 Ch. D. 523.

INVALIDITY OF VOLUNTARY COVENANT TO MAKE A SETTLEMENT.

Voluntary Covenants.—A voluntary settlement, to be effectual, must be complete, and not rest in contract, for a mere agreement to do an act not supported by valuable consideration, cannot be specifically enforced (*n*), even though it be under seal (*o*). At law a contract under seal requires no consideration, but in equity a voluntary covenant, *e.g.*, a covenant in a voluntary settlement to settle after-acquired property (*p*), will not be enforced, and does not create any equitable estate. A voluntary settlement is effectual if the settlor has done everything in his power to make a legal transfer of the property, or if he has declared himself to be a trustee of the property for the *cestuis que trust.* It was, however, held in one case, which has since been doubted (*q*), that a covenant by a widow on her second marriage to settle property for the benefit of her children by a former marriage, if made pursuant to an agreement between her and her intended husband, will be enforced at the suit of the children (*r*).

It is now well settled that a voluntary deed, purporting to be a complete transfer of property, but not effectual as such, will not be construed as a declaration

(*n*) *Pownall* v. *Anderson* (1856), 2 Jur. (N.S.) 857; *Antrobus* v. *Smith* (1806), 12 Ves. 39.

(*o*) *Re Earl of Lucan* (1890), 45 Ch. D. 470.

(*p*) *Wilkinson* v. *Wilkinson* (1858), 4 Jur. (N.S.) 47.

(*q*) See *Att.-Gen.* v. *Jacobs Smith*, [1895] 2 Q. B. 349.

(*r*) *Gale* v. *Gale* (1877), 6 Ch. D. 144.

of trust so as to be binding in equity (*s*). On the other hand, a voluntary settlement effected by a complete conveyance of land to trustees is not rendered inoperative by the disclaimer of the trustees and consequent revesting of the estate in the settlor (*t*); although a settlor or his representatives cannot be compelled under the voluntary settlement to do any further act to render it binding (*u*). It has, however, been held, in a case in which a voluntary deed contained a covenant for further assurance, and the estate of the settlor was administered in the Court of Chancery after his death, that the volunteer was entitled to damages out of the estate for breach of the covenant (*x*).

SECTION 9.

RENT-CHARGES AND LAND TAX.

Rent Charges created by Deed.—A rent-charge arises on a grant by one person to another of an annual sum of money payable out of certain lands in which the grantor may have any estate (*y*). A rent-charge issuing out of a term of years is a chattel interest (*z*). Section 44 of the Conveyancing Act, 1881, confers certain remedies on the owner of a

(*s*) *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11; Lewin Trusts, 73.

(*t*) *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*u*) *Dening* v. *Ware* (1856), 22 Beav. 184; *Heartley* v. *Nicholson* (1875), L. R. 19 Eq. 233.

(*x*) *Cox* v. *Barnard* (1850), 8 Hare, 310.

(*y*) Williams, Real Property, 20th ed., 418.

(*z*) *Re Fraser*, [1904] 1 Ch. 726.

rent-charge, whether charged on land or the income thereof, viz.:

(1) A power of distress when the rent is in arrear for twenty-one days.

(2) A right of entry when the rent is in arrear for forty days.

(3) Power in a like case to demise the land for a term of years to a trustee upon trust to raise the arrears by mortgage, sale or demise (*a*).

In addition to these statutory remedies the owner of a rent-charge may sue the terre-tenant for debt (*b*), even in the absence of an express contract to pay the rent (*c*), and notwithstanding that the profits of the land fall short of the amount of the annual charge (*d*). The expression terre-tenant means the person in possession of the land subject to the charge as tenant in fee, and does not include a tenant for years (*e*). When a rent-charge, charged on the fee simple of real estate, is in arrear, the court has power to order the arrears to be raised by sale or mortgage of the estate (*f*); but if the rent-charge is secured by a term of years, the owner of the rent-charge is not entitled to an order for the sale of the fee simple (*g*).

(*a*) These provisions now apply to improvement rent-charges (see Improvement of Land Act, 1899, s. 3), and rent-charges created on enfranchisement of Copyholds (Copyhold Act, 1894, s. 27).

(*b*) *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368.

(*c*) *Ex parte Graham* (1889), 42 Ch. D. 343; *Searle* v. *Cooke* (1890), 43 Ch. D. 532.

(*d*) *Pertwee* v. *Townsend*, [1896] 2 Q. B. 129.

(*e*) *Re Herbage Rents*, [1896] 2 Ch. 811.

(*f*) *Re Tucker*, [1893] 2 Ch. 323.

(*g*) *Blackburne* v. *Hope-Edwards*, [1901] 1 Ch. 419.

Tithe Rent-charge.—By the Tithe Commutation Act, 1836 (*h*), the payment of tithe was abolished, and the payment of a sum in the nature of a rent-charge substituted, varying with the price of wheat, barley and oats, and calculated on a septennial average. Tithe rent-charge is now payable by the owner, and not by the occupier of the land charged (*i*), and the only means of recovering it is to apply to the county court, when the rent is three months in arrear, and obtain an order for a receiver, or in case the land is in hand, for a distress by an officer of the court (*k*).

Redemption of Rent-charges.—Rent-charges may be redeemed by application to the Board of Agriculture under s. 45 of the Conveyancing Act, 1881, but this section does not apply to tithe-rent charge or to a rent-charge reserved on a sale or lease. A tithe rent-charge may be redeemed in certain cases at twenty-five years' purchase by application to the Board of Agriculture under the Tithe Commutation Act, 1878 (*l*).

Land Tax.—Land tax was originally an annual impost only. In the year 1798 an apportionment of land tax was made by the commissioners under the Land Tax Act of 1797 (*m*), and the amount then

(*h*) 6 & 7 Will. 4, c. 71.

(*i*) See Tithe Act, 1891 (54 Vict. c. 8), s. 1. An agreement by the tenant to pay tithe rent-charge is void (*Ludlow* v. *Pike*, [1904] 1 K. B. 531).

(*k*) *Ibid.*, s. 2.

(*l*) 41 & 42 Vict. c. 42, ss. 1—5; see also ss. 20, 31—39 of the Act of 1860 (23 & 24 Vict. c. 93).

(*m*) 38 Geo. 3, c. 5.

charged on every parish, known as "the parish quota," was made perpetual by the statute 38 Geo. 3, c. 60, but subject to redemption. This parish quota is assessed annually between the owners or occupiers of land subject to land tax, but the amount assessed in any year on any parish must not exceed one shilling in the pound on the annual value of the land in the parish subject to land tax, and the excess is remitted (*n*). Until recently land tax was redeemed under the Land Tax Redemption Act, 1802 (*o*), and it has been held under that statute that, where land tax is redeemed by a limited owner, the question whether the charge merges in the inheritance depends upon intention to be evidenced by the acts of the party (*p*). Land tax is now redeemable under the Finance Act, 1896 (*q*), and the redemption money may be paid in one sum or by annual instalments (*r*). Any person having an estate in lands and tenements (except tenants at rack-rent or holding under the Crown) may contract for the redemption of the land tax charged thereon.

Where any person redeems land tax by payment of a capital sum, the Commissioners of Inland Revenue will, on his application at the date of redemption, grant to him a certificate charging the property with the amount of that sum, and with interest equal to the amount of the land tax redeemed, and he will be entitled to the charge as if it were a mortgage secured to him by a mortgage deed; and such charge, when

(*n*) Finance Act, 1896 (59 & 60 Vict. c. 28), s. 31.

(*o*) 42 Geo. 3, c. 116.

(*p*) *Trevor* v. *Trevor* (1834), 2 My. & K. 675.

(*q*) Ss. 31—36.

(*r*) See Chandler, Land Tax, 64.

the certificate is registered in pursuance of the Lands Charges Act, 1888, will have priority over all other charges and incumbrances, and any money authorised to be invested in real security may be invested on the security of any such charge. An apportionment of land tax may be made under s. 35 of the Act of 1802 for the purposes of redeeming a portion of property which is charged by the current assessment in one sum. Land tax is assessed as from Lady Day in each year, and is payable on or before the first day of January following.

OTHER STATUTORY CHARGES ON LAND.

Improvement Charges.—By the Land Drainage Act, 1845, tenants for life, and certain other persons having a limited interest in lands, were empowered, with leave of the Court of Chancery, to make permanent improvements by draining with tiles, stones, or other durable materials, or by warping, irrigation or embankment in a permanent manner, or by erecting thereon any buildings of a permanent kind incidental or consequential to such drainage, etc., and to charge the money expended in making such improvements, and obtaining the authority of the court, upon the inheritance, such interest not exceeding 5 per cent. per annum, the principal to be repayable by annual instalments as therein mentioned (*s*).

The Public Money Drainage Acts (*t*) empower tenants for life and other owners of land to obtain

(*s*) 8 & 9 Vict. c. 56, ss. 3—5, 8, 9.

(*t*) (1846), 9 & 10 Vict. c. 101; (1847), 10 & 11 Vict. c. 11; (1848), 11 & 12 Vict. c. 119; (1850), 13 & 14 Vict. c. 31; (1856), 19 & 20 Vict. c. 9.

advances from Government for drainage works to be completed within five years (*u*), such advances to be paid by a rent-charge of £6 10*s*. per cent., payable for a term of twenty-two years (*x*).

The Improvement of Land Act, 1864 (*y*), provides for the raising of money by way of rent-charge for the improvement of land at a rate of interest not exceeding 5 per cent. per annum, and to be repayable by instalments over a period not exceeding twenty-five years (*z*), which has been extended to forty years by a subsequent enactment (*a*).

By s. 55 of this Act the absolute order of the commissioners, now the Board of Agriculture, is conclusive as to the validity of the charge. The holder of the charge may by deed direct that it shall be reunited to and merge in the beneficial interest in the land, but the charge is deemed to be personal property (*b*). The Settled Land Act, 1882, extended and partially repealed the Improvement of Land Act, 1864.

By the Improvement of Land Act, 1899 (*c*), the charge may comprise not only the land improved, but also any other land held for the same estates or interests and either subject to the same incumbrances or free from incumbrances.

(*u*) Public Money Drainage Act, 1847, s. 7.

(*x*) Public Money Drainage Act, 1846, s. 34.

(*y*) 27 & 28 Vict. c. 114.

(*z*) *Ibid.*, s. 26.

(*a*) Improvement of Land Act, 1899 (62 & 63 Vict. c. 46), s. 1 (1).

(*b*) Improvement of Land Act, 1864, s. 60.

(*c*) S. 1 (2).

The Limited Owners' Residences Acts (*d*) provide that the erection of a mansion-house and such other necessary buildings commonly appurtenant, and the completion of any mansion-house and such appurtenances already erected, and the improvement of, and addition to, any house capable of being converted into a mansion-house, shall be deemed improvements within the meaning of the Improvement of Land Act, 1864, but the sum to be charged on the estate for such purpose is not to exceed two years' rental of the whole estate (*e*).

The Limited Owners' Reservoirs Act, 1877 (*f*), further extends the provisions of the Improvement of Land Act, 1864, to the construction by limited owners of reservoirs and other permanent works for the supply of water.

An improvement rent-charge is an incumbrance within the meaning of s. 5 of the Settled Land Act, 1882 (*g*).

SECTION 10.

LONG TERMS OF YEARS.

Satisfied Terms.—Long terms of years are sometimes made use of in conveyancing, generally for the purpose of securing the payment of money, *e.g.*, raising portions for younger children. These terms, generally for 500 or 1000 years, did not formerly determine, even although the purposes for which they

(*d*) (1870), 33 & 34 Vict. c. 56; (1871), 34 & 35 Vict. c. 84.

(*e*) Limited Owners' Residences Act, 1870, s. 4.

(*f*) 40 & 41 Vict. c. 31.

(*g*) *Re Earl of Strafford and Maples*, [1896] 1 Ch. 235.

were created had been fully performed and satisfied, unless there was an express proviso for cesser inserted in the deed by which the term was created, or unless the term had merged in the freehold by operation of law. It was formerly the custom for a purchaser to keep on foot a satisfied term by having it assigned to a trustee *in trust to attend the inheritance.* The object of this was twofold, viz., as a protection against any undisclosed incumbrance on the property, and to defeat the claim of the purchaser's wife to dower. The Satisfied Terms Act (1845) (*h*), however, now provides that every term of years becoming *satisfied* after December 31st, 1845, and which, either by express declaration or by construction of law shall after that day become attendant upon the inheritance or reversion of any land, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.

A term is not satisfied within the meaning of the Act so long as there remains any useful purpose beneficial to the owner of the term and consistent with the trust on which at the date of the transaction the term was held (*i*).

Enlargement of Long Terms.—Under s. 65 of the Conveyancing Act, 1881 (*k*), as amended by s. 11 of the Conveyancing Act, 1882 (*l*), long terms of years,

(*h*) 8 & 9 Vict. c. 112, s. 2.
(*i*) *Anderson* v. *Pignet* (1872), L. R. 8 Ch. 180.
(*k*) 44 & 45 Vict. c. 41.
(*l*) 45 & 46 Vict. c. 39.

whether having an immediate reversion of freehold or not, may be enlarged into freehold by a deed of declaration, provided that they fulfil certain conditions.

These conditions are as follows:

(1) The term must have a residue unexpired of not less than two hundred years, and must have been originally created for not less than three hundred years.

(2) There must be no trust or right of redemption in favour of the freeholder or other person entitled in reversion expectant on the term.

(3) There must be no rent, or merely a peppercorn rent, or other rent having no money value (*m*), or if rent of a money value was originally reserved, the same must have been released or *barred by lapse of time* (*n*), or must in some other way have ceased to be payable.

(4) The term must not be liable to be determined by re-entry for condition broken.

(5) The term must not have been created by sub-demise out of a superior term which does not itself comply with the first four conditions.

The estate in fee simple acquired by enlargement is subject to all the same trusts, powers, executory limitations over rights and equities, and to all the same covenants and provisions relating to user and

(*m*) Such as "one silver penny if lawfully demanded," *Re Chapman and Hobbs* (1885), 29 Ch. D. 1007.

(*n*) Possibly a release may be presumed, but the expression used in the Act is misleading since the Statutes of Limitations do not apply. See *ante*, p. 192 (*Blaiberg* v. *Keeves*, [1906] 2 Ch. 175).

enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged (o).

SECTION 11.

ENFRANCHISEMENT OF COPYHOLDS (p).

Methods of Enfranchisement.—In many cases, property which was originally of copyhold tenure has been converted into freehold by enfranchisement, and where land has been treated as freehold for upwards of one hundred years an enfranchisement has been presumed (q). There are three methods by which copyholds may now be enfranchised, viz., a voluntary enfranchisement at common law, a voluntary enfranchisement under the Copyhold Act, 1894 (r), and a compulsory enfranchisement under that Act.

I.—An enfranchisement at common law can only be made where the lord has an estate in fee in the manor or a power to convey the fee simple (s), or where he is tenant for life under the Settled Land Acts (t). It seems that a copyholder with only an equitable or limited estate may accept an enfranchisement at common law (u). An enfranchisement deed

(o) Conveyancing Act, 1881, s. 65 (4).

(p) See also Scriven, Copyholds, 7th ed., 1896, and Brown, Copyhold Enfranchisements, 2nd ed., 1895.

(q) *Re Lidiard and Jackson and Broadley's Contract* (1889), 42 Ch. D. 254; but *cf. Ecclesiastical Commissioners* v. *Parr*, [1894] 2 Q. B. 420.

(r) 57 & 58 Vict. c. 46.

(s) Scriven, Copyholds, 7th ed., 326.

(t) Settled Land Act, 1882, s. 3 (2).

(u) Scriven, Copyholds, 7th ed., 327.

granted by the Commissioners of Woods and Forests has to be enrolled at the Land Revenue Record Office, and also on the Manor Court Rolls (*x*).

II.—A voluntary enfranchisement under the Copyhold Act, 1894 (*y*), is the method adopted where the lord has no power to enfranchise at common law or under the Settled Land Acts. This kind of enfranchisement is made by agreement between the lord and the tenant with the consent of the Board of Agriculture (*z*). With regard to limited owners, the Act provides that notice in writing of the proposed enfranchisement must be given to the person entitled to the next estate of inheritance in remainder or reversion in the manor or land to be affected by the enfranchisement, but in the case of the tenant this is not necessary if he has paid the whole cost of the enfranchisement (*a*). A voluntary enfranchisement under the Act is "affected, with the consent of the Board of Agriculture, by such a deed as would be proper on an enfranchisement by a lord seised of the manor for an absolute estate in fee simple in possession" (*b*).

III.—A compulsory enfranchisement is only resorted to where the lord and tenant cannot agree as to the terms of enfranchisement, or where one or other is opposed to an enfranchisement being made. The enfranchisement is made by an award of the Board of Agriculture, and can be obtained either by the lord or the tenant; but when the tenant has been

(*x*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), ss. 63, 69.

(*y*) Copyhold Act, 1894, ss. 14—20.

(*z*) *Ibid.*, s. 14 (1) (2).

(*a*) *Ibid.*, s. 14 (3). (*b*) *Ibid.*, s. 16 (1).

admitted in respect of a mortgage, he cannot require an enfranchisement unless he is mortgagee in possession (*c*). Prior to 1858 the enfranchisement had to be by deed. The award of the commissioners was *registered* under s. 9 of the Copyhold Act, 1852, but by s. 33 the execution of the deed by the commissioners was conclusive. The Act of 1858 (s. 10) did away with the necessity for a deed and substituted an award.

The conversion of copyhold land into freehold by enfranchisement does not affect the rights or interest of any person in the land under a will, settlement, mortgage or otherwise; nor does it affect subsisting leases; and the land is held under the same title as that under which it was held at the date at which the enfranchisement takes effect (*d*).

SECTION 12.

SUCCESSION DUTY.

What constitutes a Succession.—By the Succession Duty Act (*e*), which came into operation on May 19th, 1853, every disposition of property by reason whereof any person becomes beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of the Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial

(*c*) Copyhold Act, 1894, s. 1. (*d*) *Ibid.*, s. 21.
(*e*) 16 & 17 Vict. c. 51.

interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of the Act to any other person in possession or expectancy, shall be deemed to have conferred a *succession* upon the person so entitled, who is known as the *successor*. The term *predecessor* denotes the person from whom the interest of the successor is derived (*f*). This section (s. 2) has been held to apply to all cases of succession which do not come within any other section of the Act (*g*).

When persons have property vested in them jointly by a title not conferring a succession, any interest accruing by survivorship is deemed a succession (*h*).

Appointments under Powers.—When a person has a *general* power of appointment under a disposition of property taking effect on the death of a person dying after the time appointed for the commencement of the Act, he shall, in the event of his making an appointment thereunder, be deemed to be entitled at the time of exercising the power to the interest appointed as a succession derived from the donor of the power; and where a person has a *limited* power of appointment under such a disposition, the person taking the appointed property will be deemed to take the same as a succession derived from the person *creating* the power as predecessor (*i*). The

(*f*) Succession Duty Act, 1853, s. 2. As to meaning of "predecessor," see *Att.-Gen.* v. *Dowling* (1880), 5 Ex. D. 139.

(*g*) *Re Lovelace* (1859), 4 De G. & J. 340; *Att.-Gen.* v. *Gardner* (1863), 32 L. J. Ex. 84.

(*h*) Succession Duty Act, 1853, s. 3.

(*i*) *Ibid.*, s. 4; *Att.-Gen.* v. *Upton* (1866), L. R. 1 Ex. 224.

first part of this section (s. 4) only applies to an absolute power possessed by one person enabling him to dispose of property as absolute owner, and does not apply to a power given in a family settlement to a father and son where one is intended to be a check upon the other (*k*).

Extinction of Determinable Charges.—Where the property is subject to a charge, estate or interest determinable by death or at any period ascertainable only by reference to death, the increase of benefit accruing to any person on the extinction or determination of the charge will be deemed a succession accruing to the person then entitled beneficially to the property or the income thereof (*l*) ; but a person entitled at the commencement of the Act to real property subject to leases for life, or for years determinable on life, is not liable to duty in respect of the determination of such leases in the event of the same occurring in his lifetime (*m*).

Reservations.—Where any disposition of property, not being a sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, is accompanied by a reservation or assurance of or contract for any benefit to the grantor or any other person for life, or for any period ascertainable only by reference to death, such disposition will confer, at the time appointed for the

(*k*) *Charlton* v. *Att.-Gen.* (1879), 4 App. Cas. 427.

(*l*) Succession Duty Act, 1853, s. 5; and *cf.* Customs and I. R. Act, 1889 (52 Vict. c. 7), s. 6 (5) (b).

(*m*) Succession Duty Act, 1853, s. 6.

determination of such benefit, an increase in such beneficial interest in such property as a succession equal in annual value to the yearly value of the benefit so reserved (*n*).

Dispositions of property to take effect at a period ascertainable on death, and fraudulent dispositions made for evading duty, will confer successions (*o*).

Transferred Interests.—Where reversionary property expectant on death is vested by alienation or other derivative title in any person, such person will be charged with duty at the same time and rate as the original successor would have been chargeable if there had been no alienation; and where any succession shall, before falling into possession, have become vested by alienation or any title not conferring a succession in any other person, the duty must be paid at the same rate and time as if there had been no such alienation (*p*); and where the title to any succession shall be *accelerated* by the surrender or extinction of any prior interest, the duty will be payable as if there had been no such acceleration (*q*); but the duty on a succession in expectancy may be commuted under s. 41.

Interest of the Successor.—The interest of a successor to real estate was formerly considered to be of the value of an annuity equal to the annual value

(*n*) Succession Duty Act, 1853, s. 7.

(*o*) *Ibid.*, s. 8.

(*p*) *Att.-Gen.* v. *Duke of Northumberland*, [1905] A. C. 406.

(*q*) Succession Duty Act, 1853, s. 15; *Ex parte Sitwell* (1888), 21 Q. B. D. 466; but *cf. Att.-Gen.* v. *Robertson*, [1893] 1 Q. B. 293.

of such property (*r*). Now, however, when the successor is *competent to dispose* of the property, the value of the succession is taken to be the principal value of the property after deducting estate duty (*s*).

Mode of Payment of Duty.—Succession duty is paid by eight equal half-yearly instalments, or in the case of successions after July 1st, 1888, in two equal moieties (*t*). The first of the instalments must be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the property. If the successor die before the instalments have become due, the instalments not due at his decease will cease to be payable, except in the case of a successor who may have been competent to dispose by will (*u*) of a continuing interest in such property, in which case the instalments unpaid at his death will be a continuing charge on such interest in exoneration of his other property, and will be payable by the owner for the time being of such interest (*x*); and it has been held that the circumstance that a person becoming entitled and dying before all the instalments of duty are payable is insane or a *feme covert*, does not exempt the estate of such person from the unpaid instalments (*u*), and the case of a tenant in tail who disentails and acquires the fee, and dies before all the instalments have become payable, is not within the exemption (*z*).

(*r*) Succession Duty Act, 1853, s. 21.
(*s*) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 18.
(*t*) Customs and I. R. Act, 1888 (51 Vict. c. 8), s. 22.
(*u*) *Att.-Gen.* v. *Hallett* (1857), 2 H. & N. 368.
(*x*) Succession Duty Act, 1853, s. 21.
(*z*) *Lilford* v. *Att.-Gen.* (1867), L. R. 2 H. L. 63.

In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance is to be made of all necessary outgoings (*a*); but where the legal estate is vested in trustees, the parties beneficially interested will not be entitled to deduct as necessary outgoings expenses of management incurred by such trustees (*b*).

By s. 38 of the Succession Duty Act, which has received a very liberal construction (*c*), where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, he is entitled to an allowance in respect of such property in computing the assessable value of his succession.

Duty a First Charge.—The duty imposed is a first charge on the interest of the successor, and of all persons claiming in his right, on all the real and personal property in respect whereof the same is assessed, and the duty will be a debt due to the Crown from the successor, having, in the case of real property, priority over all charges and interests created by him, but such duty does not charge or affect any real property of the successor other than the property comprised in the succession (*d*).

(*a*) Succession Duty Act, 1853, s. 22.

(*b*) *Re Elwes* (1858), 3 H. & N. 719; *In the Matter of Earl Cowley's Succession* (1866), L. R. 1 Ex. 288.

(*c*) *Commissioners of Inland Revenue* v. *Harrison* (1874), L. R. 7 H. L. 1.

(*d*) Succession Duty Act, 1853, s. 42.

Exemptions from Duty.—Subject as mentioned below, no succession duty is payable in the following cases:

(1) When the successor is the husband or wife of the predecessor (*e*).

(2) When the principal value of the whole property is under £100.

(3) Where the succession takes place on the death of some person after August 1st, 1894, the net value of whose property does not exceed £1000 and estate duty has been paid on such property (*f*).

(4) If the successor is a lineal descendant or ancestor of the predecessor and estate duty (*g*) or probate duty (*h*) has already been paid in respect of the property.

But cases (1) and (4) are now subject to s. 58 of the Finance (1909—1910) Act, 1910, which makes the duty payable in these cases, except—

(*a*) Where the principal value of the property passing on the death of the deceased in respect of which estate duty is payable (other than property in which the deceased never had an interest and property of which the deceased never was competent to dispose and which on his death passes to persons

(*e*) Succession Duty Act, 1853, s. 18.

(*f*) Finance Act, 1894, s. 16 (3).

(*g*) *Ibid.*, s. 1.

(*h*) Customs and I. R. Act, 1881 (44 Vict. c. 12), s. 41. Probate Duty (abolished in 1894) did not affect real estate unless it was converted in equity at the time of the death, *e.g.*, partnership property or land contracted to be sold.

other than the husband or wife or a lineal ancestor or descendant of the deceased) does not exceed £15,000, whatever may be the value of the legacy or succession; or

(*b*) Where the amount or value of the legacy or succession together with any other legacies or successions derived by the same person from the testator, intestate or predecessor does not exceed £1000, whatever may be the principal value of such property; or

(*c*) Where the person taking the legacy or succession is the widow or a child under the age of twenty-one years, of the testator, intestate or predecessor and the amount or value of the legacy or succession, together with any other legacies or successions derived by the same person from the testator, intestate or predecessor does not exceed £2000, whatever may be the principal value of such property.

In addition to the cases in which no duty is payable, a purchaser is not concerned with the question whether Succession Duty has been paid in any of the following cases:

(1) When land is sold under an overriding power of sale, whether such power is express or implied (*i*).

(2) When land is sold in pursuance of a trust for sale (*k*).

(*i*) Succession Duty Act, 1853, s. 42; *Dugdale* v. *Meadows* (1870), L. R. 6 Ch. 501.

(*k*) *Ibid.*, s. 29.

(3) When the sale is made under the Settled Estates Act (*l*) or the Settled Land Acts (*m*).
(4) If the succession took place more than twelve years before the sale (*n*).

Receipt.—Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession, or any part thereof will exonerate a bonâ fide purchaser for valuable consideration and without notice from such duty, notwithstanding any suppression or misstatement in the account, upon the footing whereof the same may have been assessed, or any insufficiency of such assessment: and no bonâ fide purchaser of property for valuable consideration, under a title not appearing to confer a succession, shall be subject to any duty with which such property may be chargeable under the provisions of this Act, by reason of any extrinsic circumstances of which he may not have had notice at the time of such purchase (*o*).

SECTION 13.

ESTATE DUTY.

Principle of the Finance Act, 1894.—The Finance Act, 1894 (*p*), imposed a new duty, called Estate Duty, upon all estates exceeding £100 of persons dying after August 1st, 1894. The principle on which this Act

(*l*) *Re Warner's Settled Estates* (1881), 17 Ch. D. 711.
(*m*) Dart, Vendors and Purchasers, 7th ed., 1233.
(*n*) Customs and I. R. Act, 1889 (52 Vict. c. 7), s. 12.
(*o*) Succession Duty Act, 1853, s. 52.
(*p*) 57 & 58 Vict. c. 30.

was founded is, that *whenever property changes hands on death*, the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding (*q*).

What the Act has in view for the purposes of taxation is *property passing on death*, not, as in the case of Succession Duty, the *interest of the successor*, and not the interest of the deceased, which, if it be a limited interest, can never pass (*r*).

Property passing on Death.—The first section of the Finance Act, 1894, contains the pith and substance of the enactment, and, subject to certain exceptions or savings (*s*), it imposes estate duty upon the principal value of all property *settled or not settled* which passes on death.

Under this general provision is included the case of the death of the tenant for life of settled property whether or not the tenant for life has assigned his interest during his lifetime. But if the tenant for life has surrendered his interest to the remainderman, or if tenant for life and remainderman in fee combine to sell the settled property, there is no property passing on the death of the tenant for life (*t*). On the same

(*q*) See *Earl Cowley* v. *Inland Revenue Commissioners*, [1899] A. C., at p. 211. Section 14 of the Finance Act, 1900, is an exception to this general proposition.

(*r*) *Earl Cowley* v. *Inland Revenue Commissioners*, *supra*, at p. 212; but *cf.* s. 2 (1) (b) (d).

(*s*) The principal exceptions are to be found in s. 2 (3) (as to trustees), ss. 3, 5 (3), and see also Finance Act, 1896, s. 15 (1).

(*t*) *Att.-Gen.* v. *Beech*, [1899] A. C. 53; *Earl Cowley* v. *Inland Revenue Commissioners*, *supra*, at p. 219.

principle, if the property is settled subject to an existing mortgage, or if tenant for life and remainderman combine to mortgage the fee, all that passes on the death of the tenant for life is the equity of redemption (*u*).

Property deemed to pass on Death.—In addition to property which *literally* passes on the death of the deceased (*x*), s. 2 (1) of the Finance Act, 1894 (which is subsidiary and supplemental to the first section, although classes (A) and (B) do to a certain extent overlap it), and s. 11 of the Finance Act, 1900, add certain classes of property which for the purposes of the Finance Act are to be *deemed* to pass on the death.

These classes are five in number, viz.:

A. "Property of which the deceased was at the time of his death competent to dispose" (*y*). This clause provides for the case of general powers of appointment whether such powers are exercised by the deceased or not (*z*). So, too, if property is limited to A. for life, with remainder to B. for life, and after the death of the survivor for such persons as B. shall by deed or will appoint, on the death of B. in the lifetime of A., estate duty is payable

(*u*) *Att.-Gen.* v. *Montagu*, [1904] A. C., at p. 319.

(*x*) Passing on the death in s. 1 means "changing hands" on the death, [1899] A. C. 211; *Inland Revenue Commissioners* v. *Priestley*, [1901] A. C. 213. It is difficult to reconcile this with s. 22 (1) (l).

(*y*) Finance Act, 1894, s. 2 (1) (a).

(*z*) *Earl Cowley* v. *Inland Revenue Commissioners*, [1899] A. C., at. p. 213; see also *Re Scott*, [1900] 1 Q. B. 372.

under this sub-section (a), for the property is deemed to pass although it does not actually change hands until the death of A.

B. "Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest" (b). This clause is intended primarily to provide for the case of determinable charges (c), but the Act contemplates the contingency of the interest extending to the *whole income* of the property (d). Where there was a mortgage by the tenant for life and remainderman, and an arrangement made whereby the remainderman relieved the tenant for life from bearing any of the burden of the mortgage, it was held that so much of the income of the property as was applicable to payment of interest on the mortgage was an interest ceasing on the death of the tenant for life (e).

C. Property which would be liable to account duty, if the statutory provisions relating to account duty (f) extended to real as well as personal property, and were not restricted to voluntary settlements. This last class includes—

(a) *Inland Revenue Commissioners* v. *Priestley*, [1901] A. C. 208.

(b) Finance Act, 1894, s. 2 (1) (b).

(c) [1899] A. C., at pp. 214, 221.

(d) S. 7 (7) (a).

(e) *Att.-Gen.* v. *Montagu*, [1904] A. C. 316.

(f) Customs and I. R. Act, 1881 (44 & 45 Vict. c. 12), s. 38.

(i) property disposed of by the deceased by way of gift, however effected, or by marriage settlement, within three years of his death, or at any time if possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor (*g*), or of any benefit to him by contract or otherwise (*h*); (ii) property formerly belonging to the deceased, which he has transferred to himself and some other person, so that on the death of the deceased it passes by survivorship to such other person; and (iii) property settled by the deceased in such a way that an interest for any period determinable by reference to death, or a power of revocation, is reserved to the settlor.

D. "Any annuity or other interest purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased" (*i*). The purpose of this sub-section is to prevent a man escaping duty by abstracting from his means during life moneys or money's worth which when he dies are to reappear in the

(*g*) *Att.-Gen.* v. *Seccombe*, [1911] 2 K. B. 688.

(*h*) *Cf.* Finance Act, 1894, s. 2 (3); Finance (1909—1910) Act, 1910, s. 59; *Earl Grey* v. *Att.-Gen.*, [1900] A. C. 124.

(*i*) Finance Act, 1894, s. 2 (1) (d).

form of a beneficial interest accruing or arising on his death (*k*).

E. An estate or interest surrendered to the person entitled in remainder or reversion unless the surrender was made *three years* before the death of the deceased, and bonâ fide possession and enjoyment of the property was assumed thereunder immediately upon the surrender, to the entire exclusion of the person who had the estate or interest (*l*).

Rate of Duty.—The rate of estate duty increases from one up to 15 per cent., according to the value of the estate (*m*). For determining this rate all property existing at the death of the deceased, in respect of which estate duty is leviable, is *aggregated* so as to form one estate on the principal value of which the duty is levied. The exceptions to the rule as to aggregation are:

Non-aggregable Property.—(1) Property in which the deceased never had an interest (*n*).

(2) When the net value of the real and personal property in respect of which estate duty is payable on the death of the deceased, *exclusive* of property settled otherwise than

(*k*) *Lethbridge* v. *Att.-Gen.*, [1907] A. C. 19.

(*l*) Finance Act, 1900 (63 Vict. c. 7), s. 11; Finance (1909—1910) Act, 1910, s. 59. This only applies in the case of deaths after March 31st, 1900, and is intended to meet the decision in *Att.-Gen.* v. *De Preville*, [1900] 1 Q. B. 223.

(*m*) Finance Act, 1894, s. 17; Finance Act, 1907 (7 Edw. 7, c. 13), s. 12; Finance (1909—1910) Act, 1910, s. 54.

(*n*) Finance Act, 1894, s. 4.

by his will, does not exceed £1000, that real and personal property is not aggregated (*o*).

(3) Property of national—scientific, historic or artistic interest (*p*).

(4) Prior to the Finance Act, 1900 (*q*), there was also an exception as to property which, under a disposition not made by the deceased, passed on his death to some person other than wife, husband, lineal ancestor or descendant, *e.g.*, where the deceased was tenant for life of an estate with remainder to his brother. This exception was abolished by the Finance Act, 1900, except as against bonâ fide purchasers of the estate in remainder prior to April 9th, 1900, but has been revived by the Finance Act, 1907 (*r*), in the case of persons dying after April 19th, 1907.

Settlement Estate Duty.—Settled property upon which estate duty has been paid since the settlement is not liable to any further estate duty until the death of some person who is competent to dispose of the property. A duty, however, called SETTLEMENT ESTATE DUTY at the rate of 2 per cent. is payable on settled property chargeable with estate duty if it passes to some person not competent to dispose of it; but settlement estate duty is payable only once during the continuance of the settlement (*s*).

(*o*) Finance Act, 1894, s. 16 (3).

(*p*) Finance Act, 1896, s. 20; Finance (1909—1910) Act, 1910, s. 63.

(*q*) Finance Act, 1900, s. 12.

(*r*) S. 16.

(*s*) Finance Act, 1894, s. 5; Finance (1909—1910) Act, s. 54.

When Estate Duty is a Charge on the Property.—The most important question with regard to Estate Duty as between vendor and purchaser is whether the duty is a charge on the property.

The personal representatives of the deceased (in the Act called "the executor") are bound to pay the duty on "all personal property wheresoever situate of which the deceased was competent to dispose at his death" (*t*), and for this duty they alone are accountable (*u*).

Personal property of course includes leaseholds (*x*) and real estate converted in equity, *e.g.*, where there is a subsisting trust for sale and one of the beneficiaries who is competent to dispose of a share of the proceeds dies before the sale takes place (*y*). All personal property of which the deceased was competent to dispose, including property over which he had a general power of appointment (*z*), "passes to the executor as such" and the estate duty is not charged on the property. But where legacies or shares of residue are settled the Settlement Estate Duty must be borne by the settled legacy or share of residue (*a*). Since, however, the executor is accountable for settlement estate duty (*b*) a purchaser of leaseholds appears not to be concerned to see to the discharge of the duty.

(*t*) Finance Act, 1894, s. 6 (2).
(*u*) *Ibid.*, s. 8 (3).
(*x*) *Re Culverhouse*, [1896] 2 Ch. 251.
(*y*) *Elliott* v. *Fisher* (1842), 12 Sim. 505; Austen-Cartmell, Finance Acts, 98.
(*z*) *Re Hadley*, [1909] 1 Ch. 20.
(*a*) Finance Act, 1896, s. 19.
(*b*) *Re King*, [1904] 1 Ch. 363.

As regards all property which does not pass to the executor as such, that is to say, all freehold (*c*) and copyhold land not converted in equity and all personal property of which the deceased was not competent to dispose, a rateable part of the estate duty payable on the death is a first charge on the property in respect of which it is leviable (*d*), and "every person in whom the same is vested in possession by alienation or other derivative title" is accountable for the duty on the property (*e*). Consequently, a purchaser of real estate, even though he is buying from the executors of the deceased, is bound to see that estate duty has been paid. It is true that both as regards personal liability (*f*) and also as regards the charge on the property (*g*) the Act of 1894 exempts "a purchaser for valuable consideration *without notice*," but it is conceived that without notice means without notice of the death upon which the property passed. A certificate purporting to discharge the property effectually exonerates the purchaser, notwithstanding any fraud or failure to disclose material facts on the part of the vendor or person accountable (*h*); this certificate is granted on the commissioners being satisfied that the full estate duty either *has been* or *will be* paid in respect of the estate (*i*).

(*c*) The Land Transfer Act, 1897, has made no difference in this respect (*Re Palmer*, [1900] W. N. 9).

(*d*) Finance Act, 1894, s. 9 (1).

(*e*) *Ibid.*, s. 8 (4).

(*f*) *Ibid.*, s. 8 (18).

(*g*) *Ibid.*, s. 9 (1).

(*h*) *Ibid.*, s. 11 (4).

(*i*) *Ibid.*, s. 11 (1).

At the expiration of twelve years from the death giving rise to the claim for duty the charge ceases however, and, consequently, at the expiration of this time, a purchaser is not bound to see whether it has been paid (*k*).

Duty only Payable once under a Settlement.—During the continuance of a settlement estate duty is only payable once. If estate duty has already been paid in respect of any settled property since the date of the settlement, no further estate duty and (subject to the qualification made by s. 58 (2) of the Finance (1909—1910) Act, 1910, referred to above) no 1 per cent. legacy or succession duty is payable until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property and who, if on his death subsequent limitations under the settlement take effect in respect of such property, was *sui juris* at the time of his death, or had been *sui juris* at any time while so competent to dispose of the property (*l*). Moreover, estate duty is not payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before August 1st, 1894 (*m*), in respect of which property probate duty or account duty has been paid, unless the deceased was at the time of his death, or at any time since the will or disposition took effect, had been competent

(*k*) Finance Act, 1894, s. 8 (2), by which s. 12 of the Customs and I. R. Act, 1889, is made applicable to estate duty.

(*l*) Finance Act, 1894, s. 5 (2); Finance Act, 1898, s. 13.

(*m*) Finance Act, 1894, s. 21 (1).

to dispose of the property. Notwithstanding the reference to personal property, this sub-section applies to any property in respect of which probate duty has been paid, no matter what the form of that property may be at the time when the question of the liability to estate duty arises (*n*).

Reversionary Interests.—Where an interest *fails* or *determines* by reason of death before it becomes an interest in possession (*e.g.*, a reversionary life interest), and *subsequent limitations* under the settlement continue to subsist, no estate duty is payable (*o*). Thus, if property is settled in favour of A. for life with remainder to B. for life with an ultimate remainder to A. absolutely, no duty is payable on the death of B. in the lifetime of A. (*p*).

If, however, the interest does not fail or determine, but has not fallen into possession at the death, as in the ordinary case of a limitation to A. for life, with remainder to B. when B. dies in the lifetime of A., estate duty is of course payable. In that case the persons accountable for the duty have an option either to pay the duty at once or to defer payment until the interest falls into possession (*q*). If the duty is paid at once it is paid on the market value of B.'s reversion, an abatement being made in respect of A.'s life interest, estimated according to the accepted tables of mortality. In that case no further duty is payable on the death of A. if A. is the

(*n*) *Att.-Gen.* v. *Londesborough*, [1905] 1 K. B. 98.

(*o*) Finance Act, 1894, s. 5 (3).

(*p*) *Att.-Gen.* v. *Wood*, [1897] 2 Q. B. 102.

(*q*) Finance Act, 1894, s. 7 (6).

settlor (*r*), but this does not now apply if the settlement was made by some person other than A. (*s*) If, however, payment is deferred until the death of A., the duty is payable on the full value of the interest which has fallen into possession, and not merely on its value at the death of B. (*t*). The practice of the commissioners is to treat the deferred payment in respect of the death of B. as satisfying the claim for duty which would otherwise arise in respect of the death of A.; but there does not appear to be any decision on this point. Section 7 (10) provides that estate duty shall not be levied more than once "on the same death"; but this may perhaps be construed as meaning *in respect of* the same death (*u*).

SECTION 14.

INCREMENT VALUE DUTY.

Principle of the Duty on Increment Value.—By s. 1 of the Finance (1909—1910) Act, 1910 (*x*), there was established a new duty on land called Increment Value Duty, payable on the occasions specified in the Act on the then increase of its site value over that value on April 30th, 1909. The Act appears to have been intended to impose a tax on the

(*r*) Finance Act, 1894, s. 5 (2); *Inland Revenue* v. *Priestley*, [1901] A. C. 208.

(*s*) Finance (1909—1910) Act, 1910, s. 55.

(*t*) *Re Eyre*, [1907] 1 K. B. 331.

(*u*) Possibly this case also falls within s. 5 (2), but it cannot, it is conceived, be said that at the death of A. "duty has already been paid."

(*x*) 10 Edw. 7, c. 8.

value which has been added to land not by the expenditure, the skill or the foresight of the owner, but through the general growth and industry of the community (y), and it is therefore charged on the site value alone ascertained in the manner provided by the Act.

Occasions on which Duty payable.—Section 1 of the Finance (1909—1910) Act, 1910, provides that the duty shall be paid—

(*a*) On the occasion of any transfer on sale of the fee simple of the land or of any interest in the land in pursuance of any contract made after the commencement of the Act (*z*) or the grant in pursuance of any contract made after the commencement of the Act of any lease (*a*) (not being a lease for a term of years not exceeding fourteen years) of the land; and

(*b*) On the occasion of the death of any person dying after the commencement of the Act where the fee simple of the land or any interest in the land is comprised in the property passing on the death of the deceased

(*y*) Napier, Land Taxes, 2nd ed., 3. See, however, *Lumsden* v. *I. R. Commrs.*, [1913] 1 K. B. 346.

(*z*) *I.e.*, April 29th, 1910. The Act does not define the expression "transfer on sale." It may possibly include a decree for foreclosure. Cf. Finance Act, 1898, s. 6. The duty is not payable on voluntary conveyances, exchanges, partitions or mortgages. See Napier, *supra*, 9. As to the meaning of "fee simple," "land," and "interest" in relation to land, see s. 41 of the Act.

(*a*) "Lease" includes underlease and agreement for a lease or underlease, see s. 41.

within the meaning of ss. 1 and 2, sub-s. (1) (*a*) (*b*) and (*c*) and sub-s. (3) of the Finance Act, 1894, as amended by any subsequent enactment (*b*) ; and

(*c*) Where the fee simple of the land or any interest in the land is held by any body corporate or by any body unincorporate as defined by s. 12 of the Customs and Inland Revenue Act, 1885, in such a manner or on such permanent trusts that the land or interest is not liable to death duties, on such periodical occasions as are provided in the Act (*c*).

Definition of Increment Value.—By s. 2 (1) of the Act the increment value of any land is to be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of Part I. of the Act as to valuation (*d*).

(2) The site value of the land on the occasion on which increment value duty is to be collected is to be taken to be—

(*a*) Where the occasion is a transfer on sale of the fee simple of the land, the value of the consideration for the transfer (*e*), and

(*b*) See these sections, *ante*, p. 235 *et seq.*

(*c*) These are by s. 6 (1), April 5th, 1914, and in every subsequent fifteenth year. See *post*, p. 251.

(*d*) The general provisions of the Act as to valuation are contained in ss. 25—32. They are beyond the scope of this book.

(*e*) See further as to determining the value of consideration, s. 32 of the Act.

(*b*) Where the occasion is the grant of any lease of the land, or the transfer on sale of any interest in the land, the value of the fee simple of the land, calculated on the basis of the value of the consideration for the grant of the lease or the transfer of the interest; and

(*c*) Where the occasion is the death of any person, and the fee simple of the land is property passing on that death, the principal value of the land as ascertained for the purposes of Part I. of the Finance Act, 1894, and where any interest in the land is property passing on that death the value of the fee simple of the land calculated on the basis of the principal value of the interest as so ascertained; and

(*d*) Where the occasion is a periodical occasion on which the duty is to be collected in respect of the fee simple of any land or of any interest in any land held by a body corporate or unincorporate, the total value of the land on that occasion to be estimated in accordance with the general provisions of Part I. of the Act as to valuation;

subject in each case to the like deductions as are made, under the general provisions of Part I. of the Act as to valuation, for the purpose of arriving at the site value of land from the total value (*f*).

(*f*) The section contains further provisions for substituting the real value for the original site value as ascertained under the Act where it is proved to have exceeded that value on a sale within twenty years before April 30th, 1909. These provisions have been extended by the Revenue Act, 1911, s. 2.

Method of collecting Increment Value Duty on Transfer on Sale, etc.—Increment value duty is a stamp duty collected and recovered in accordance with the provisions of the Act (*g*). On any transfer on sale of the fee simple of any land or of any interest in land or on the grant of any lease of any land for a term exceeding fourteen years the duty must be assessed by the Commissioners and paid by the transferor or lessor as the case may be (*h*); and it is the duty of the latter to present to the Commissioners the instrument by means of which the transfer or the lease is effected or agreed to be effected, or reasonable particulars thereof, for the purpose of the assessment of the duty under a heavy penalty (*i*). Such instrument will not be deemed to be duly stamped (*k*) unless it is stamped—

(*a*) Either with a stamp denoting that the increment value duty has been assessed by the Commissioners and paid in accordance with the assessment; or

(*b*) With a stamp denoting that all particulars have been delivered to the Commissioners which in their opinion are necessary for the purpose of enabling them to assess the duty, and that security has been given for the payment of duty in any case where the Commissioners have required security; or

(*g*) See s. 3 (6) of the Act.

(*h*) A contract throwing the liability on the transferee or lessee is void. Revenue Act, 1911, s. 1.

(*i*) See Finance (1910—1911) Act, 1910, s. 4 (1) and (2).

(*k*) *I.e.*, for the purposes of s. 14 of the Stamp Act, 1891, and notwithstanding s. 12 of that Act.

(c) With a stamp denoting that upon the occasion in question no increment value duty was payable; but where an instrument is so stamped it must, notwithstanding any objection relating to the increment value duty, be deemed to be duly stamped so far as respects that duty (l).

These provisions make it necessary for a purchaser to examine the stamps on the documents of title to see whether the requirements of this section have been complied with since, although the duty is not a charge upon the property in these cases, but a debt due from the transferor or lessor as the case may be (m), the document cannot be given in evidence unless it is stamped with one of the stamps specified (n).

When Duty a Charge on the Property.—When the duty becomes payable on the occasion of the death of a person the provisions as to the assessment collection and recovery of estate duty under the Finance Act, 1894, will apply as if increment value duty to be collected on the occasion of the death of any person were estate duty; but where any interest in land in respect of which increment value duty is payable is property passing to the personal representative as such the duty is payable out of that interest in land in exoneration of the rest of the deceased's estate and is collected upon an account delivered by the personal representative setting forth the increment value in respect of the property (o).

(l) See Finance (1909—1910) Act, 1910, s. 4 (3). In practice a stamp of the second kind is used.

(m) See s. 4 (4). (n) Napier, *supra*, 83. (o) See s. 5.

We have already seen (*p*) that as regards all property which does not pass to the executor as such as rateable part of the estate duty payable on the death is a first charge on the property, in respect of which it is leviable, and it appears necessarily to follow that increment value duty will also be a charge in the case of such property, and since the present statute provides that even in the case of any interest in land passing to the executor as such the duty is payable "out of" that interest, it appears to be a charge in the case of this species of property likewise (*q*).

It is therefore essential for a purchaser to satisfy himself whenever it appears that the duty has become payable on the death of any person through whom the title is traced, that the duty has been duly discharged, otherwise he will be liable to pay it himself (*r*).

Recovery of Duty from Corporations.—In the third class of cases in which the duty is payable, namely, where the fee simple of any land or any interest in land is held by any body corporate or by any body unincorporate, as defined by s. 12 of the Customs and Inland Revenue Act, 1885, in such a manner or on such permanent trusts that the land or interest is not liable to death duties, the occasions on which increment value duty is to be collected are the 5th of April in the year 1914, and in every subsequent fifteenth year (*s*).

The account to be delivered under s. 15 of the

(*p*) Finance Act, 1894, s. 9 (1), *ante*, p. 242.
(*q*) See Napier, *supra*, 105, 106.
(*r*) See Finance Act, 1894, s. 8 (4), *ante*, p. 242.
(*s*) Finance (1909—1910) Act, 1910, s. 6 (1).

Customs and Inland Revenue Act, 1885, must, in the case of the account to be delivered in the year 1914, and in every subsequent fifteenth year, contain an account of the increment value of the land, as on the preceding 5th of April, and that section will, save as in the Act of 1910 is provided, apply for the purpose of increment value duty, whether the body corporate or unincorporate are chargeable with duty under Part II. of the Customs and Inland Revenue Act, 1885, or not (*t*).

The provisions of ss. 13—18, of sub-s. (1) of s. 19, and of s. 20 of the Customs and Inland Revenue Act, 1885 (with the exception of any provisions relating to appeals), are to have effect for the purpose of the assessment and recovery of increment value duty as they have effect for the purpose of the duty charged under s. 11 of that Act: Provided that increment value duty may, if the body corporate or unincorporate chargeable therewith so desire, be paid by fifteen equal yearly instalments, and the first instalment will be due immediately after the assessment of the duty. Any part of any duty so payable by instalments may be paid up at any time (*u*).

The effect of this provision is to make the increment value duty a stamp duty recoverable like succession duty (*x*) and to make it a first charge on all the property in respect whereof it is payable while such property remains in the possession or under the control of the body corporate or unincorporate chargeable with it or of any party or parties acquiring the

(*t*) Finance (1909—1910) Act, 1910, s. 6 (2).
(*u*) *Ibid.*, s. 6 (3).
(*x*) Customs and Inland Revenue Act, 1885, s. 13.

same with notice of any such duty being in arrear (y). It seems to follow that a purchaser from a corporation or other body chargeable cannot safely complete without satisfying himself that all duty has been paid (z).

Exemptions from Increment Value Duty.—Various species of property are exempted from the liability to increment value duty. These are shortly as follows:

(1) Agricultural land while the land has no higher value than its market value at the time for agricultural purposes only (a).

(2) Small dwelling-houses as defined by the Act (b).

(3) Small holdings in the owner's occupation as defined by the Act (c).

(4) Land held by any body corporate or unincorporate without any view to profit for the purpose of games or other recreation under the conditions specified in the Act (d).

(5) Crown lands (e).

(6) Separate tenements, flats or dwellings (f).

(7) Land held by or on behalf of a rating authority or any statutory combination of two or more local or rating authorities (g).

(8) Land held for the purposes of a body constituted for charitable purposes whether occupied or used by that body or not (h).

(y) Customs and Inland Revenue Act, 1885, s. 14.

(z) See this subject discussed at length in Napier, *supra*, 125, 126, 129.

(a) Finance (1909—1910) Act, 1910, s. 7. See the definition of "Agriculture" and "Agricultural land" in s. 41.

(b) *Ibid.*, s. 8 (1).

(c) *Ibid.*, s. 8 (2).

(d) *Ibid.*, s. 9.

(e) *Ibid.*, s. 10.

(f) *Ibid.*, s. 11.

(g) *Ibid.*, s. 35.

(h) *Ibid.*, s. 37 (1).

(9) Land held by a registered society as defined by the Act or by a company within the meaning of the Companies (Consolidation) Act, 1908, or any body of persons incorporated by special Act if that company or body are by their memorandum or Act precluded from dividing any profit amongst their members (*i*).

(10) Land held by a statutory company so long as it is held for the purposes of their undertaking and cannot be appropriated by the company except to those purposes (*k*).

(*i*) Finance (1909—1910) Act, 1910, s. 37 (2). It may be observed that a body incorporated by royal charter is not within the exemption, and that in any case the exemption is limited to the duty to be collected on any periodical occasion.

(*k*) *Ibid.*, s. 38.

PART IV.

OF INVESTIGATION OF TITLE AND CONDITIONS RESTRICTING THE SAME.

CHAPTER XI.

EVIDENCE OF TITLE.

Verification of the Abstract.—When the purchaser has satisfied himself that a primâ facie title is disclosed by the abstract, it becomes necessary to consider how the abstracted documents ought to be verified, and what evidence must be called for with regard to the various facts, such as birth, death, marriage, etc., which are alleged in the abstract.

The cost of procuring evidence of the vendor's title falls on the purchaser, but where what is required is not evidence of a pre-existing fact, but *the fact itself* (*e.g.*, a surveyor's certificate that a house has been completed to the satisfaction of the lessor), the cost falls on the vendor (*a*). It is conceived that the principle applies to the case of a certificate of discharge of estate duty where the duty has not in fact been paid, and the certificate is given for the purposes of the sale upon the commissioners being satisfied that

(*a*) *Re Moody and Yates* (1885), 30 Ch. D. 344.

it will be paid in due course (*b*). The various points likely to suggest themselves on perusal of the abstract are arranged alphabetically in order to facilitate reference.

Abstracted Documents are proved by the production of the originals except in the case of instruments on record (*c*). The purchaser should satisfy himself that all abstracted documents are produced from the proper custody, since he may be affected with notice of the equitable rights of a third party having the custody of the title deeds. The stamps should be examined, and it should be seen that all necessary parties have duly executed the deeds, and that they contain proper receipts. With reference to attestation, execution by attorney, dates, receipts, etc., the reader is referred to the appropriate headings.

Acknowledgments (*d*).—In the case of acknowledgments by married women made since December 31st, 1882, a memorandum of acknowledgment indorsed on the deed is sufficient evidence. An acknowledgment made prior to that date must be proved by an office copy of the certificate filed in the proper office of the Supreme Court, where an index of such acknowledgments is kept (*e*).

Acts of Parliament.—A King's printer's copy of an Act of Parliament is sufficient evidence of any Act

(*b*) No charge is made by the commissioners, but the correspondence leading up to the grant generally involves some small expense.

(*c*) See heading "Record," *post*, p. 275. (*d*) *Ante*, p. 54.

(*e*) Conveyancing Act, 1882, s. 7 (8).

affecting the title of the vendor, and the Evidence Act, 1845 (*f*), s. 3, renders it unnecessary to prove that the copy was printed by the King's printers. By the Documentary Evidence Act, 1882 (*g*), a copy of an Act purporting to issue out of His Majesty's Stationary Office is equally admissible. A Private Act not printed by the King's printers must be proved by an examined copy (*h*).

Alterations appearing in a deed are, in the absence of evidence to the contrary, presumed to have been made before the deed was executed. According to the rule in *Pigot's Case* (*i*) an alteration, made after the execution of a deed, by one of the parties or even, it would seem, by a stranger, with the privity of the obligee renders the deed void; but this rule only applies when the alteration is material (*k*). An alteration in a document not under seal, if assented to by the parties, is valid (*l*).

Appointments under Powers.—See ATTESTATION.

Assent of Executors.—Where the vendor is selling as legatee of leasehold property, the purchaser must satisfy himself that the executors have assented to the

(*f*) 8 & 9 Vict. c. 113.

(*g*) 45 & 46 Vict. c. 9, s. 2.

(*h*) By s. 9 of the Interpretation Act, 1889, every Act passed after 1850 is a public Act, and must be judicially noticed as such unless the contrary is expressly provided by the Act.

(*i*) (1614), 11 Rep. 26 b.

(*k*) *Crediton* v. *Exeter*, [1905] 2 Ch. 455. *Quære*, whether the rule in *Pigot's Case* would in any case be followed if the alteration was made by a stranger.

(*l*) *Stewart* v. *Eddowes* (1874), L. R. 9 C. P. 311.

bequest, and the same rule applies to the case of a sale by the devisee of freeholds if the testator died after December 31st, 1897. An assent in writing should, if possible, be obtained (*m*), although it has been held that a parol assent is sufficient (*n*). An assent to the devise of a life estate operates as an assent to the devise in remainder (*o*), and the assent vests the property in the legatee in the case of a residuary as well as in the case of a specific bequest (*p*). As a general rule, an assent may be presumed when the legatee or devisee is in possession of the property; but if the executor is also tenant for life, it is frequently difficult to ascertain in what capacity he has taken possession (*q*).

Attestation.—The execution of a deed is in practice always attested, although this is not requisite in the case of an ordinary conveyance. The following deeds require attestation, viz., assurances to charitable uses; deeds appointing new trustees of charity lands; bills of sale: memorials in the Middlesex registry; and appointments under powers (*r*).

With regard to deeds exercising powers of appoint-

(*m*) An assent in writing does not require a stamp, *Kemp* v. *Commissioners I. R.*, [1905] 1 K. B. 581.

(*n*) *Re Pix*, [1901] W. N. 165.

(*o*) *Stevenson* v. *Mayor of Liverpool* (1874), L. R. 10 Q. B. 81.

(*p*) *Re Culverhouse*, [1896] 2 Ch. 251; *Austin* v. *Beddoe* (1893), 41 W. R. 620.

(*q*) *Coles* v. *Miles* (1852), 10 Hare, 179; *Fenton* v. *Clegg* (1854), 9 Ex. 680. It is apprehended that a purchaser without notice of assent by the executor is not protected. See Coote, Mortgages, 8th ed., 405.

(*r*) Taylor, Evidence, 797.

ment, it is provided by Lord St. Leonard's Act (*s*) that a deed executed after August 13th, 1859, in the presence of two or more witnesses in the way in which deeds are usually executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power, notwithstanding that the instrument creating the power may require some other form of execution. If the appointment was executed before August 13th, 1859, or if, although executed since that date it is only attested by *one* witness, it is necessary to ascertain what formalities are prescribed by the instrument creating the power. It should, however, be borne in mind that equity will aid the defective exercise of a power in favour of a purchaser, mortgagee, creditor, wife, child, or a charity (*t*).

Power of Attorney.—If a deed is executed by attorney the power of attorney must be produced (*u*). The same rule applies to the surrender of copyholds by attorney; but not, of course, to an admittance. A power of attorney executed abroad in any part of His Majesty's dominions should be executed before a notary public, and certified under his seal (*v*).

If the instrument creating the power was executed before January 1st, 1883, evidence must be furnished that the donor was alive, and was not a bankrupt at the time of its being acted on (*x*).

(*s*) 22 & 23 Vict. c. 35, s. 12.

(*t*) *Tollett* v. *Tollett* (1728), Wh. & Tu., 8th ed., Vol. II., 296.

(*u*) *Re Airey*, [1897] 1 Ch. 164.

(*v*) R. S. C., Order XXXVIII., r. 6.

(*x*) *Re Oriental Bank Corporation* (1884), 28 Ch. D. 640.

A trustee, executor, or administrator making a payment or doing an act bonâ fide under a power of attorney is not liable for the moneys paid or the act done by reason of the fact that the grantor was dead or had avoided the power, if at the time the power was exercised such trustee, executor, or administrator was not aware of the death of the grantor or the avoidance by him of the power (*y*). The Conveyancing Act, 1881, s. 47, provides that any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same. This section seems to enable an attorney to give a valid discharge for the purchase money to a purchaser without notice, but it does not enable him to pass the legal estate.

Powers of attorney executed since December 31st, 1882, are valid and effectual in favour of a purchaser if they are either given for valuable consideration and expressed to be irrevocable, or, although not given for valuable consideration, are expressed to be irrevocable for a fixed term not exceeding one year, unless the power has been revoked by the donor with the concurrence of the donee (*z*). Apart from any

(*y*) Trustee Act, 1893, s. 23, re-enacting the Law of Property Amendment Act, 1859, s. 26.

(*z*) Conveyancing Act, 1882, ss. 8, 9.

statutory provision, a power of attorney is irrevocable if it is an authority coupled with an interest (*a*).

Section 48 of the Conveyancing Act, 1881, provides for the deposit of original instruments creating powers of attorney in the central office of the Supreme Court of Judicature, upon their execution being verified by affidavit, statutory declaration, or other sufficient evidence, and for the inspection and furnishing of office copies thereof.

So far we have only considered the validity of the instrument creating the power; but it is also necessary to consider (1) whether the execution by the attorney was within the scope of the authority conferred on him, and (2) whether he has executed the deed in the proper form. Powers of attorney are construed strictly; and it has been held that a power to sell real estate belonging to the principal does not authorise the attorney to sell property held by the principal as mortgagee under the mortgagee's statutory power of sale (*b*). A general power of attorney given by a trustee, and not limited to the execution of some specific instrument, is void, as being a delegation of the trust (*c*). As to the second point, prior to the Conveyancing Act, 1881, an execution by an attorney, which was not made *in the name* and on behalf of his principal, was void, although he described himself as attorney, professed to grant as attorney, and executed as attorney (*d*). In the case, however,

(*a*) *Frith* v. *Frith*, [1906] A. C. 254.

(*b*) *Re Dowson and Jenkins' Contract*, [1904] 2 Ch. 219.

(*c*) *Re Hetling and Merton's Contract*, [1893] 3 Ch. 269.

(*d*) *Laurie* v. *Lees* (1880), 14 Ch. D., at p. 256.

of instruments executed since December 31st, 1881, the execution by an attorney in his own name is valid (*e*), and if he executes in a double capacity, *i.e.*, on behalf of himself and as attorney for another, it is not, it is conceived, necessary for him to go through the ceremony of writing his name twice (*f*).

Awards.—See INCLOSURE AND ENFRANCHISEMENT.

Bankruptcy Proceedings.—The Bankruptcy Act, 1883 (*g*), provides that petitions, orders, certificates, deeds, and other instruments, or copies of them, and affidavits or documents made or used in the course of any bankruptcy proceedings are to be receivable in evidence if under the seal of the court or purporting to be signed by any judge having jurisdiction in bankruptcy (*h*); a copy of the London Gazette containing any notice of a receiving order or order of adjudication is conclusive evidence of such orders having been duly made and of their date (*i*). When, therefore, the title depends upon bankruptcy, the abstract should be verified accordingly.

Birth can be proved by certified extract from the parochial register, or from the general register established by the Births and Deaths Registration Act, 1836. A statement contained in a baptismal certificate is not strictly conclusive as to the date of birth, but may be accepted as presumptive evidence (*k*).

(*e*) Conveyancing Act, 1881, s. 46.
(*f*) *Young* v. *Schuler* (1883), 11 Q. B. D., at p. 655.
(*g*) 46 & 47 Vict. c. 52.
(*h*) *Ibid.*, s. 134. (*i*) *Ibid.*, s. 132.
(*k*) *Re Turner* (1885), 29 Ch. D. 985.

Cesser of Charges such as of an annuity or jointure must be evidenced by proving the death of the annuitant or jointress, and the receipt by his or her legal personal representatives for the apportioned part of the last instalment which had accrued at the death.

Covenants.—See LEASEHOLDS AND NEGATIVE EVIDENCE.

Date of Documents.—Where a document bears a date, it will be presumed to have been executed on the day of such date, and if two or more deeds of a series bear date on the same day they will be presumed to have been executed in the order necessary to effect the object intended to be attained (*l*); and where a document purporting to be a deed appears to have been signed and attested, it will be presumed to have been sealed and delivered, although no impress of a seal may appear (*m*).

Death is sufficiently evidenced by the probate of the will, or letters of administration of the deceased. It may also be proved in the same manner as birth and marriage, or by certified copies from the burial registers established by the Burial Act, 1853 (*n*). Death is presumed in the case of a person who has not been heard of for more than seven years (*o*), but

(*l*) *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.* (1882), 21 Ch. D. 762; Best, Evidence, s. 403.

(*m*) *Hall* v. *Bainbridge* (1848), 12 Q. B. 699; Phipson, Evidence, 461.

(*n*) 16 & 17 Vict. c. 134, s. 8.

(*o*) *Nepean* v. *Doe* (1837), 2 M. & W. 897.

the onus of proving the particular time of death within the period of seven years rests on the person whose title is founded on death at that time.

Death without Issue.—There would seem to be no presumption that a person who is presumed to be dead died without issue (*p*), nor in the case of commorientes is there any presumption as to survivorship (*q*).

Death without issue is a negative fact, which it is difficult to prove. Proof may consist of evidence of celibacy, grant of administration to distant relatives, family reputation, or evidence of living witnesses.

Death Duties.—Payment of estate duty must be proved by the certificate of discharge of the Commissioners of Inland Revenue under s. 11 of the Finance Act, 1894. Payment of succession duty and temporary estate duty must be proved by the receipt of the Inland Revenue Office, or certificate of payment. Succession duty must be borne by the vendor, even although payment has been postponed under s. 20 of the Succession Duty Act, 1853 (*r*).

Descent.—When a title depends on a claim by descent the *Pedigree* must be proved by certificates of birth, marriage, and death of persons through whom the claim is traced, and who, if living, would have been entitled, and by the wills and grants of administration of persons whose devisees would have

(*p*) *Re Jackson*, [1907] 2 Ch. 354.
(*q*) Phipson, Evidence, 603.
(*r*) *Re Kidd and Gibbon*, [1893] 1 Ch. 695.

been entitled before the heir, to show that these persons left no such devisees. In the absence of sufficient evidence of this nature, it must be completed by extracts from deeds or wills of relations and extracts from parish books, family Bibles, old books and papers, inscriptions on tombstones, or declarations of competent persons (*s*); and proof of failure of issue must be shown to verify a pedigree where prior estates are alleged not to have vested for default of such issue.

Discharge of Legacies, etc.—The discharge of a legacy is proved by the release or receipt of the legatee, and a discharge of portions by the release of the portionist (*t*); but the purchaser should satisfy himself that the legatee or portionist was *sui juris* at the time of making such release.

Discharges for legacies or other sums charged upon land must be produced, notwithstanding twelve years may have elapsed since they became payable, as the claims may still subsist in consequence of the disability of the person entitled, or an intermediate acknowledgment may have been given (*u*).

Duties.—See DEATH DUTIES.

Enfranchisement.—An enfranchisement of copyholds under the Act of 1894 is proved by the award of the Board of Agriculture, or, if the enfranchisement is voluntary, by the execution by the Board of the

(*s*) Prideaux, Con. tit. "Abstract"; see also *Howarth* v. *Smith* (1833), 6 Sim. 170.

(*t*) *Cf. Re Rebbeck* (1894), 63 L. J. Ch. 596.

(*u*) Real Property Limitation Act, 1874, s. 8.

deed of enfranchisement (v). An enfranchisement under the previous Acts, 1841 to 1887, is proved by a copy of the Award under the seal of the Copyhold Commissioners or the Land Commissioners.

Enrolled Deeds may be evidenced by production of certified copies of the originals if the original deeds are not in the possession of the vendor; but if in the possession of the vendor the originals should be produced. The fact of enrolment is proved by the indorsed certificate.

Fines are proved by the production of the chirograph or an exemplification under the seal of the court, or an examined copy proved by the oath of the examiner. A recovery is proved by an exemplification or a copy examined with the roll.

Heirship.—See DESCENT.

Identity of parcels, if not sufficiently apparent from the plans and descriptions contained in the abstracted deeds, must be proved by a statutory declaration of an old inhabitant.

A tithe commutation map, although frequently used for purposes of identification, is not admissible on a question of boundary (x), and is not to be confused with a terrier. A terrier is a record of the glebe lands and other temporal possessions of the parish church, usually written by the parish clerk, and signed by the rector and churchwardens and attested

(v) Copyhold Act, 1894, s. 61.

(x) *Wilberforce* v. *Hearfield* (1877), 5 Ch. D. 709.

by the bishop's registrar. Terriers are evidence of the matters stated being made under the authority of the 87th Canon of the year 1603.

Inclosure Awards are proved by examination of the copy which under s. 146 of the Inclosure Act, 1845 (*y*), has to be deposited with the clerk of the peace of the county in which the lands enclosed are situate.

Intestacy is sufficiently proved for conveyancing purposes, by production of letters of administration, in the absence of special circumstances (*z*). Even though a will appointing executors is subsequently discovered, it would seem that a conveyance by the administrator in due course of administration, is perfectly valid (*a*).

Joint Tenants.—If the vendor sells as the survivor of joint tenants, it should be considered whether there is any evidence of the severance of the joint tenancy.

A joint tenancy may be severed by a mere agreement between the joint owners, although the matter rests *in fieri* (*b*), and such an agreement may be inferred from a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common (*c*).

(*y*) 8 & 9 Vict. c. 118.

(*z*) Dart, Vendors and Purchasers, 7th ed., 375.

(*a*) *Hewson* v. *Shelley*, [1914] W. N. 127, reversing [1913] 2 Ch. 384, see *ante*, p. 87.

(*b*) *Gould* v. *Kemp* (1834), 2 My. & K. 310.

(*c*) *Williams* v. *Hensman* (1860), 1 John. & H. 546.

A covenant in a marriage settlement to settle after-acquired property is sufficient to sever a joint tenancy (*d*); but the marriage of a female joint tenant does not of itself effect a severance (*e*).

Leaseholds.—On the sale of *leasehold* property, the purchaser is bound to assume that the lease has been duly granted, unless the contrary appears (*f*).

The receipt for the last payment due for rent under the lease before the date of actual completion must be produced by the vendor as evidence that the covenants in the lease have been duly performed (*g*). In this connection it may be mentioned that the courts of equity, under their original jurisdiction, have always relieved against forfeiture of a lease for non-payment of rent and in cases of breach of covenant due to fraud, accident, or mistake, but not if the breach is due to mere forgetfulness on the part of the lessee (*h*). It is provided by the Conveyancing Act, 1881, s. 14 (1), that a right of re-entry or forfeiture under any stipulation in a lease, for a breach of covenant or condition, shall not be enforceable until the lessor serves on the lessee a notice specifying the breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the same, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy it, if it is capable of remedy, and

(*d*) *Hewett* v. *Hallett*, [1894] 1 Ch. 362.
(*e*) *Palmer* v. *Rich*, [1897] 1 Ch. 134.
(*f*) Conveyancing Act, 1881, s. 3 (4) (5).
(*g*) See *post*, p. 340.
(*h*) *Barrow* v. *Isaacs & Son*, [1891] 1 Q. B. 417.

to make reasonable compensation in money, to the satisfaction of the lessor for the breach. By sub-s. 2 of the same section, the court has a statutory power to give relief to the lessee, "having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all other circumstances." But these provisions do not extend to a covenant or condition against assigning, underletting, or parting with the possession or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest where a year has expired from the date of the bankruptcy or taking in execution, and the lessee's interest has not been sold (*i*). Section 4 of the Conveyancing Act, 1892, enables the court to grant relief to an *underlessee* upon forfeiture of the superior lease, and extends to cases in which the court would have no power to grant relief to the lessee (*k*).

Lost Deed.—When a deed has been lost or destroyed, it is necessary for the vendor to supply (1) sufficient evidence of the loss, and (2) sufficient evidence of the contents, execution, and stamping of the lost deed. The vendor must prove that every reasonable search for the document has been made (*l*); and the secondary evidence must be *clear* and *cogent* so that the purchaser may maintain his title against

(*i*) Conveyancing Act, 1881, s. 14 (6); Conveyancing Act, 1892, s. 2 (2).

(*k*) *Imray* v. *Oakshotte*, [1897] 2 Q. B. 218; *Gray* v. *Bonsall*, [1904] 1 K. B. 601.

(*l*) *Hart* v. *Hart* (1841), 1 Hare, 1; Dart, Vendors and Purchasers, 7th ed., 155; *Hawker* v. *King* (1900), 108 L. T. Newsp., p. 540.

all those who may attack him when he is in possession, and so that he may pass on the title in the ordinary way in the market to a purchaser or a mortgagee (*m*). There is a presumption that a lost deed was duly stamped, but this presumption may be rebutted (*n*).

The recital of a deed is evidence of its existence as against the parties executing the deed in which it is recited and those claiming under them, but not of its contents, unless its loss or destruction be proved (*o*).

Marriage can be proved by certified extracts from the parochial registers or from the general register established by the Births and Deaths Registration Act, 1836. General reputation not confined to family repute is admissible in proof of marriage, and when the parties have cohabited ostensibly as man and wife marriage may generally be presumed.

Negative Evidence.—In some cases a purchaser is entitled to require production of instruments which do not form part of the chain of title by way of negative evidence. For example, on a sale by trustees where the trusts of the purchase money are declared by a separate settlement of even date with the conveyance to the trustees, a purchaser may require production of the instrument declaring the trusts in order to see that it contains nothing inconsistent with the power of the trustees to give receipts (*p*).

(*m*) *Halifax Commercial Bank* v. *Wood* (1899), 79 L. T. 536.

(*n*) *Marine Investment Co.* v. *Haviside* (1872), L. R. 5 H. L. 624.

(*o*) Burton, Comp. 478.

(*p*) Dart, Vendors and Purchasers, 6th ed., 365.

So if the purchaser has notice that the vendor executed a settlement on marriage, he should require production of the settlement in order to satisfy himself that it does not contain a covenant as to after-acquired property; but the mere fact that the vendor is a married woman does not put the purchaser on his inquiry whether there has been a settlement (*q*), although a requisition on this point is not unusual (*r*). If a purchaser is told that there was no settlement he cannot press the matter further (*s*). As a general rule, a purchaser cannot require any negative evidence which is not in the vendor's possession or power (*t*). If there are covenants affecting the property, the purchaser is entitled it is conceived to evidence that there has been no breach of such covenants (*u*). This is clearly so in the case of leaseholds, and it is conceived that the same principle applies to the case of restrictive covenants affecting the freehold, *e.g.*, a covenant restricting the erection of houses of less than a certain value when the purchaser desires to have the right to enforce the restrictions with reference to the neighbouring property. Again, when property is subject to debentures by way of floating security, a purchaser is entitled to evidence that the security has not crystallized (*v*). On the other hand, when a trustee vendor only had power to sell if the testator's

(*q*) *Lloyd's Bank* v. *Jones* (1885), 29 Ch. D., at p. 230.

(*r*) Dart, Vendors and Purchasers, 7th ed., 367.

(*s*) *Jones* v. *Smith* (1841), 1 Hare, 43.

(*t*) See Dart, Vendors and Purchasers, 7th ed., 366, 367.

(*u*) *Ringer* to *Thompson* (1881), 51 L. J. Ch. 42.

(*v*) *Re Horne and Hellard* (1885), 29 Ch. D. 736.

personal estate was insufficient, it was held that the purchaser was not entitled to evidence negativing the sufficiency of the personal estate (*x*).

Orders of the Court are proved by examining the originals, or by office copies, and it is conceived that the vendor is bound, if required to do so, to produce an office copy at the purchaser's expense (*y*). Section 70 of the Conveyancing Act, 1881, which provides that an order of the court under any statutory or other jurisdiction "shall not, as against a purchaser, be invalidated on the ground of (*inter alia*) want of jurisdiction," does not operate to give a good title to a purchaser at a sale under an order of the court, when the court by inadvertence deals with the interest of a person not a party to the proceedings (*z*).

Possibility of Issue.—A title may occasionally depend upon the assumption that some living person is past child bearing. In the case of a man impossibility of issue is never presumed (*a*), and even in the case of a woman, the court will not hold with reference to the Rule against Perpetuities that a woman, however old, is incapable of bearing children (*b*). Apart from the Rule against Perpetuities, a spinster is usually presumed to be past child bearing at the age of fifty-four, and the presumption was made

(*x*) *Greetham* v. *Colton* (1865), 34 Beav. 615; *sed quære cf. Carlyon* v. *Truscott* (1875), L. R. 20 Eq. 348.

(*y*) Dart, Vendors and Purchasers, 7th ed., 483.

(*z*) *Jones* v. *Barnett*, [1900] 1 Ch. 370.

(*a*) Best, Evidence, 391.

(*b*) *Re Dawson* (1888), 39 Ch. D. 155.

in the case of a widow aged fifty-six who had never had but one child, and lived afterwards with her husband for twenty-four years (*c*).

Power.—See ATTESTATION; ATTORNEY.

Receipts.—Before the Conveyancing Act, 1881, the receipt for the purchase money *in the body of the deed* was not considered sufficient, on the ground, apparently, that the deed might have been delivered as an escrow (*d*). Deeds executed before January 1st, 1882, must have a further receipt *indorsed* on the upper of the squares formed by folding the parchment.

With regard, however, to deeds executed since the Conveyancing Act came into operation, it is provided by s. 54 of that Act that a receipt for consideration money or securities *in the body of a deed* shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed; and by s. 55 that a receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, *in favour of a subsequent purchaser not having notice* that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof. A purchaser is protected by this section, even though he has not got the legal estate (*e*).

(*c*) *Re White*, [1901] 1 Ch. 570.

(*d*) *Bickerton* v. *Walker* (1885), 31 Ch. D., at p. 159.

(*e*) *Lloyd's Bank, Limited* v. *Bullock*, [1896] 2 Ch. 192.

An indorsed receipt and, since the Conveyancing Act, a receipt clause in the body of the deed creates an estoppel; so that the grantor is estopped, as against a bonâ fide purchaser from the grantee, from asserting a prior equitable title, or from setting up the lien of an unpaid vendor (*f*).

Companies and public bodies generally have a special form of receipt, signed by their authorised agent, which is indorsed on the deed.

With regard to receipts given by trustees, mortgagees, etc., the reader is referred to Chap. XIX.

Recitals.—The Vendor and Purchaser Act, 1874 (*g*), provides that *recitals*, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of a contract shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (*h*). It is conceived that this provision does not extend to sub-recitals which are not recitals of *facts*, but merely of statements contained in previous deeds. The Conveyancing Act, 1881, s. 3 (3), provides that it shall be assumed, unless the contrary appears, that recitals contained in abstracted instruments, of any deed, will, or other document, forming part of a title prior to the

(*f*) *Rice* v. *Rice* (1853), 2 Drew. 83. FARWELL, L.J., has said this case is "a good illustration" of pure estoppel (*Rimmer* v. *Webster*, [1902] 2 Ch., at p. 173); but PARKER, J., considered that the decision did not really depend on estoppel at all. See *Capell* v. *Winter*, [1907] 2 Ch., at p. 382.

(*g*) 37 & 38 Vict. c. 78, s. 2, r. 2.

(*h*) As to this provision, see *post*, p. 324.

time prescribed by law or stipulated for the commencement of title, are correct, and give all material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgment, inrolment or otherwise.

Reconveyance.—See REDEMPTION.

Record.—The vendor must, if required to do so, produce office copies or extracts of instruments upon record comprised in the abstract, and cannot require the purchaser to examine the originals at the public offices (*i*). Since, however, the expense in any case falls on the purchaser, this rule is not adhered to in practice.

Redemption of Mortgages.—The redemption of a mortgage must be proved by the production of the deed of reconveyance duly stamped (*k*), or in the case of an equitable mortgage, by an indorsed receipt. If all the original mortgagees are living at the time, it should be seen that all were parties to the reconveyance or receipt, and even where money is advanced on a joint account, payment to one of them discharges the security only to the extent of the payee's beneficial interest, although such payee ultimately survives his co-mortgagee (*l*). If one of the mortgagees was dead

(*i*) Dart, Vendors and Purchasers, 7th ed., 482.

(*k*) As to presuming a reconveyance, see *Cooke* v. *Soltau* (1824), 2 Sim. & St. 154, and as to getting in the legal estate from the mortgagee under the Statutes of Limitations, see *Sands* to *Thompson* (1883), 22 Ch. D. 614. See also *post*, p. 410.

(*l*) *Powell* v. *Broadhurst*, [1901] 2 Ch. 160.

at the time of redemption and the mortgage was contributory, the purchaser must satisfy himself that the legal personal representatives of the deceased mortgagees were parties to the reconveyance. In the case of mortgages made before the Conveyancing Act, 1881, the receipt of the surviving mortgagee was insufficient unless there was a joint-account clause declaring (1) that the mortgage money was advanced on a joint account in equity as well as law; (2) that the survivor was entitled in equity as well as law to the mortgage money and interest; and (3) that the receipt of the survivor should be an effectual discharge. In the case, however, of mortgages made since December 31st, 1881, the receipt of the survivor is a good discharge if the mortgage money is expressed to be advanced out of money belonging to the mortgagees on a joint account *or* the mortgage is made to two or more persons *jointly* and not in shares, unless there is a contrary intention expressed in the deed (*m*).

Redemption of Land Tax.—When property is sold as free from land tax, the redemption of the land tax must be shown by production of the certificate of the Land Tax Commissioners or an official extract from the register which is kept at the Land Tax Redemption Office (*n*).

Redemption of Tithe.—If the property is sold as free from tithe, the redemption must be proved by

(*m*) Conveyancing Act, 1881, s. 61.

(*n*) *Buchanan* v. *Poppleton* (1858), 4 Jur. (N.S.) 414. As to how far the redemption of land redeems mines under the land, see *Newton Chambers* v. *Hall*, [1907] 2 K. B. 446, and cases there cited; and see *Central London Ry. Co.* v. *City of London Land Tax Commissioners*, [1911] 2 Ch. 467.

the certificate of the Tithe Commissioners (*o*) or, if the redemption was since 1889, by the certificate of the Board of Agriculture.

Registration of deeds in the registers of Middlesex and Yorkshire is proved by an indorsed certificate of registration.

Seisin may be presumed from facts tending to show that the person alleged to have been seised appeared to be the owner, such as by production of leases granted by him under which possession has been taken by the lessee (*p*), and by grant of an annuity by a person in possession, which stated that a certain person was the legal owner of the fee (*q*), or by production of receipts for rent given to persons proved to have been in the occupation of the premises, or by the declaration of such occupiers that they held of the party whose possession is sought to be proved; but occupation, although sufficient to raise a presumption of title in ejectment, does not have that effect as between vendor and purchaser (*r*).

Surrender and admittance to copyhold land must be evidenced by examined copies of the court roll.

Wills.—The will of a testator dying since the year 1857 may be evidenced with reference to both real

(*o*) Tithe Act, 1846 (9 & 10 Vict. c. 7), ss. 6, 12.

(*p*) *Clarkson* v. *Woodhouse* (1786), 5 T. R. 412 n.; *Welcome* v. *Upton* (1840), 6 M. & W. 536.

(*q*) *Doe* v. *Coulthred* (1837), 7 A. & E. 235.

(*r*) *Doe* v. *Penfold* (1838), 8 C. & P. 536; see also *Hiern* v. *Mill* (1806), 13 Ves. 122.

and personal property by production of the probate or an official copy (*s*). Prior to the Act amending the law relating to probates and letters of administration, probate of a will, although usually accepted as sufficient evidence, was not strictly admissible with regard to real estate.

(*s*) Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 64.

CHAPTER XII.

CONDITIONS OF SALE.

SECTION 1.

COMPLETION OF PURCHASE.

Time when of the Essence of the Contract.—In whatever mode the sale is effected, the agreement or conditions of sale should stipulate for the completion of the purchase on a day named; and the time so named, until the Judicature Act, 1873 (*a*), would at law have been of the essence of the contract (*b*). Courts of equity, however, regarded the time fixed for completion as a detail which was only introduced for the sake of convenience to indicate when the parties should come together, and not as an essential part of the contract between them. Since the Judicature Act, the rules of equity prevail, but nevertheless the tendency of modern decisions has been to regard time as material. Thus, exceptions have been engrafted on the general rule, and the time fixed is of the essence of the contract where, from the circumstances of the case, it must have been so in the contemplation of the parties. As instances of these exceptions may be mentioned the sale of a public-house as a going concern (*c*), or of property of a

(*a*) 36 & 37 Vict. c. 66.

(*b*) *Noble* v. *Edwardes* (1877), 5 Ch. D., at pp. 393, 394.

(*c*) *Coslake* v. *Till* (1826), 1 Russ. 376; and see *Warren* v. *Moore* (1897), 14 T. L. R. 138, and cases there cited.

determinable or wasting character; so, too, where the property is required for some *immediate purpose*, such as trade or manufacture (*d*), or the residence of the purchaser (*e*).

Time may become of the essence of the contract by the *express agreement* of the contracting parties, as where it is actually stated to be so in the conditions of sale, or where it is provided that possession shall be given by a certain day (*f*). But the fact that the contract fixes a day for completion, and provides that, if the purchase is not completed on that day, the purchaser shall pay interest, does not render time an essential condition of the contract (*g*). The time fixed for completion cannot be enlarged or varied by parol (*h*).

Where no Time Fixed.—A contract for the sale and purchase of land may be enforced, although no time for completion is fixed (*i*). The vendor in such a case is entitled to a reasonable time for making out his title (*k*). In cases where no time has been fixed, or where the time fixed is not of the essence of the contract, if either party is guilty of unnecessary delay, the proper course for the other contracting party is to serve a notice fixing a reasonable time within which

(*d*) *Parkin* v. *Thorold* (1852), 16 Beav. 65.

(*e*) *Compton* v. *Bagley*, [1892] 1 Ch., at p. 318.

(*f*) *Tilley* v. *Thomas* (1867), L. R. 3 Ch. 61.

(*g*) *Hatten* v. *Russell* (1888), 38 Ch. D. 334.

(*h*) *Stowell* v. *Robinson* (1837), 3 Bing. N. C. 928. A contract in writing cannot be *varied* by a subsequent parol agreement (*Vezey* v. *Rashleigh*, [1904] 1 Ch. 634).

(*i*) *Gray* v. *Smith* (1889), 43 Ch. D. 214.

(*k*) *Simpson* v. *Hughes and Armstrong* (1897), 76 L. T. 238.

the contract must be completed (*l*). The time so limited will be considered by the court as having become of the essence of the contract. The question of what is a reasonable time must, of course, depend on the circumstances of each case, and the notice should fix the longest time that can reasonably be required for the performance of the acts that remain to be done (*m*). In one case where the title had been accepted and the terms of the draft conveyance agreed upon, a ten days' notice given by the vendor was held to be sufficient (*n*). It must be borne in mind that a notice of this kind is not effectual unless the delay arises from improper conduct on the part of the other contracting party (*o*).

SECTION 2.

INTEREST ON PURCHASE MONEY.

Where no Date for Completion is Fixed.—Where no time is fixed for completion, the vendor is entitled to interest from the time when a good title was first shown, and the purchaser might prudently have taken possession (*p*). In a specific performance action, unless the title has been proved at the hearing or already accepted by the purchaser, an inquiry is usually directed when it was first shown that a good title

(*l*) *King* v. *Wilson* (1843), 6 Beav. 124; *Compton* v. *Bagley*, [1892] 1 Ch. 313.

(*m*) *Crawford* v. *Toogood* (1879), 13 Ch. D. 153.

(*n*) *Smith* v. *Batsford* (1897), 76 L. T. 179.

(*o*) *Green* v. *Sevin* (1879), 13 Ch. D. 589.

(*p*) *Re Spencer-Bell* (1885), 33 W. R. 771; *Re Keeble and Stillwell's Fletton Brick Co.* (1898), 78 L. T. 383.

could be made (q), and the time ascertained by such an inquiry is material not only on the question of costs, but also as fixing the date from which interest is to be computed. Interest is computed either from the date when the purchase money ought to have been paid "according to the terms of the agreement" (r), or in the absence of express stipulation from the date fixed by the Master's certificate (s) as the date when title was first shown.

Where Date for Completion Fixed.—It seems doubtful whether merely fixing a date for completion without making any express stipulation as to interest is sufficient to make interest payable from that date irrespective of whether a good title has been shown. But this point does not often arise, for the conditions usually provide for payment of interest by the purchaser "if from any cause whatever, *other than wilful default* on the part of the vendor," the purchase is not completed by the time fixed. To escape from payment of interest under this clause, the purchaser must show, first, that the vendor was guilty of wilful default, and, secondly, that the cause of the contract not being completed by conveyance on the day named, was this wilful default on the part of the vendor (t).

Wilful Default.—"Default" would appear to signify that the vendor has left undone something

(q) Seton, p. 2226.

(r) Seton, p. 2237; *North* v. *Percival*, [1898] 2 Ch., at p. 133.

(s) *Halkett* v. *Dudley*, [1907] 1 Ch., at p. 606; Fry, Specific Performance, § 1406.

(t) *Re Mayor of London and Tubbs' Contract*, [1894] 2 Ch. 524.

which he ought to have done; while "wilful" amounts to nothing more than that he knew what he was doing, and intended to do what he was doing, and was a free agent (*u*). LINDLEY, L.J., some years ago, stated the law to be now settled that "moral delinquency, intentional delay, wilful obstruction on the part of the vendor may all be absent, and yet there may be wilful default on his part disentitling him to interest" (*x*). Thus, where the vendor went abroad for a holiday two days before the time fixed for completion (*y*), where under a mistake of law, he omitted to obtain a conveyance from one or two trustee-mortgagees (*z*), where he neglected to take steps to procure admission to copyholds (*a*), or to obtain the concurrence of necessary parties (*b*), and where, owing to a misinterpretation of the conditions of sale, he refused to deliver an abstract of title (*c*), he has in each case been held guilty of wilful default.

On the other hand, mere forgetfulness or an honest mistake of fact is not wilful default. "To make up one's mind not to verify a statement is wilful, but simply not to think about verifying it is not wilful" (*d*).

(*u*) *Per* BOWEN, L.J., in *Re Young and Harston's Contract* (1885), 31 Ch. D. 168, at p. 175. See also *Re Bayley-Worthington and Cohen's Contract*, [1909] 1 Ch. 648.

(*x*) *Re Hetling and Merton's Contract*, [1893] 3 Ch. 269, at p. 281.

(*y*) *Re Young and Harston's Contract*, *supra*.

(*z*) *Re Hetling and Merton's Contract*, [1893] 3 Ch. 269, at p. 281.

(*a*) *Re Wilson's and Stevens' Contract*, [1894] 3 Ch. 546.

(*b*) *Re Earl of Strafford and Maples*, [1896] 1 Ch. 235.

(*c*) *Re Pelly and Jacob's Contract* (1899), 80 L. T. 45.

(*d*) *Re Mayor of London and Tubbs' Contract*, [1894] 2 Ch., at p. 536.

But a mistake, although honest, may amount to wilful default if it is persisted in by the vendor (*e*), and the rule is the same whether the mistake of the vendor relates to title or evidence of title or conveyance (*f*). Thus, in a recent case the refusal of the vendor to execute a conveyance to the purchaser in the form required by the purchaser was held by the majority of the Court of Appeal to be wilful default (*g*).

In a case where the words were "if from any cause whatever other than the *default* of the vendor"—the word "wilful" being omitted—the Court of Appeal held nevertheless that default must be construed as meaning wilful default, and not in the sense of mere failure to perform (*h*).

Where the condition is in an unqualified form—to pay interest whatever the cause of delay may be—as in the case of *Williams* v. *Glenton* (*i*), there seems some authority for holding that it is necessary to prove wilful delay or want of bona fides, on the part of the vendor (*k*). Probably, however, the distinction is of little importance, and the court would in no case allow the vendor to obtain interest if he is himself to blame (*l*).

(*e*) *Bennett* v. *Stone*, [1903] 1 Ch. 509, at p. 520.

(*f*) *Ibid.*, at pp. 521, 526.

(*g*) *Ibid.*, at p. 520.

(*h*) *Re Woods and Lewis' Contract*, [1898] 2 Ch. 211.

(*i*) (1866), L. R. 1 Ch. 208.

(*k*) *Esdaile* v. *Stephenson* (1822), 1 Sim. & St. 122; *Re Hetling and Merton's Contract*, [1893] 3 Ch., at p. 281.

(*l*) *Re Woods and Lewis' Contract*, [1898] 1 Ch., at p. 436; 2 Ch. 213; *Bennett* v. *Stone*, [1903] 1 Ch., at p. 525.

What is not Wilful Default.—The rule is now clearly established, that when a time for completion is fixed, the mere fact that the abstract delivered is at first defective, or that delay is caused by the state of the title and difficulties respecting the title, will not relieve the purchaser from payment of interest under the usual condition. This rule was established by the leading case of *Sherwin* v. *Shakspear* (*m*), approved by the Court of Appeal in *Williams* v. *Glenton* (*n*), and in *Mayor of London and Tubbs' Contract* (*o*), and followed in *Vickers* v. *Hand* (*p*), and *Lord Palmerston* v. *Turner* (*q*). If, however, the vendor, knowing that there is a defect in his title, fixes a day for completion which is not a reasonable time, *having regard to the difficulties which he knows he has to deal with*, it is submitted that this would be held to be wilful default on the part of the vendor (*r*). In one case it has been held that wilful default means "obstruction in the *completion* of the contract," and that if the vendor repudiates the contract altogether, and resists a specific performance action unsuccessfully, he is, nevertheless, entitled to interest on the purchase money (*s*).

If the form of condition is that the purchaser "in default" or "making default" shall pay interest, the purchaser is only liable if the delay is attributable to

(*m*) (1854), 5 De G. M. & G. 517.

(*n*) (1866), L. R. 1 Ch. 206.

(*o*) [1894] 2 Ch. 535.

(*p*) (1859), 26 Beav. 630.

(*q*) (1864), 33 Beav. 524.

(*r*) See *Re Woods and Lewis*, [1898] 2 Ch., at pp. 213, 215.

(*s*) *North* v. *Percival*, [1898] 2 Ch., at p. 135, *sed quære*.

him and cannot be compelled to pay interest where the delay is due to the state of the vendor's title (*t*).

How Payment of Interest can be avoided.— There is some conflict of authority as to how far the purchaser can escape liability to pay interest, by depositing the purchase money at a banker's, and giving the vendor the benefit of the deposit interest. It was formerly considered that the purchaser might be discharged in this way, even in the case of an express condition to pay interest, and in the absence of wilful default on the part of the vendor. Lord ROMILLY, however, in *Vickers* v. *Hand* (*u*), held the purchaser liable, notwithstanding such appropriation: and the careful judgment of NORTH, J., in *Re Riley to Streatfield* (*x*), is generally considered to have settled this point against the purchaser.

Where, however, there is *no express stipulation* as to interest, and the vendor's claim depends on the ordinary rule of the court, which gives the vendor interest at £4 per cent. as from the time when a good title is first shown, it is submitted that the purchaser may discharge himself from liability, by appropriating the purchase money, and giving the vendor notice (*y*).

The court will always struggle to prevent the purchaser from receiving the rents and profits without any correlative liability to pay interest on his purchase

(*t*) *Jones* v. *Gardiner*, [1902] 1 Ch. 191.

(*u*) (1859), 26 Beav. 630.

(*x*) (1886), 34 Ch. D. 386.

(*y*) See *Winter* v. *Blades* (1825), 2 Sim. & St. 393; *Dyson* v. *Hornby* (1851), 4 De G. & Sm. 481; *Kershaw* v. *Kershaw* (1869), L. R. 9 Eq. 56; *Bennett* v. *Stone*, [1903] 1 Ch., at p. 524.

money (z); and it is conceived that even where, owing to the wilful default of the vendor, the purchaser is not liable to £5 per cent. interest under the express condition, yet if he has been *in possession* of the property, he may be liable to £4 per cent. interest under the ordinary rule of the court (a). But if the vendor has been guilty of wilful default, even a purchaser in possession may escape payment of interest by putting the purchase money on deposit at a bank and giving notice to the vendor (b).

SECTION 3.

DEPOSIT.

Effect of Condition for Deposit.—It is usual to stipulate by the contract for a deposit to be paid by the purchaser on the signing of the contract. The deposit serves two purposes, viz., as part payment of the purchase money if the sale is carried out, and also, which is its primary object, as a guarantee that the purchaser *means business*. In sales by auction the conditions usually provide that the deposit shall be paid to the auctioneer, and until the purchase is completed he is a mere stakeholder, and must not part with it without the consent of both vendor and purchaser. The rule does not, however, apply in the event of the solicitor for the vendor receiving the deposit, and should he receive it as agent for

(z) *Bennett* v. *Stone*, [1903] 1 Ch., at p. 525, *per* COZENS HARDY, L.J.; Dart, Vendors and Purchasers, 7th ed., 652.

(a) *Wallis* v. *Sarel* (1852), 5 De G. & Sm. 429.

(b) *Golds and Norton's Contract* (1885), 52 L. T. 321.

the vendor, he must pay it over to him on demand (*c*). An auctioneer is justified in accepting a cheque in payment of deposit (*d*), but he is under no obligation so to do (*e*). If the deposit is large in amount, its investment between the sale and the completion of the purchase is frequently provided for, in which case the vendor will be entitled to any increase and must bear any loss in the value of the investment (*f*).

Condition for Forfeiture of Deposit.—It is usual to provide that, if the purchaser shall neglect to comply with the conditions, the deposit money shall be forfeited to the vendor, who shall be at liberty to resell the property, and that the deficiency in price on such second sale, and the expenses attending the same, shall be made good by the purchaser making default, and, in case of non-payment thereof, the same shall be recoverable as liquidated damages (*g*). This stipulation will entitle the vendor, where the purchaser after accepting the title makes default, to resell the estate and recover the deficiency and expenses from the purchaser (*h*); but he cannot, of course, after

(*c*) *Edgell* v. *Day* (1865), L. R. 1 C. P. 80; *Ellis* v. *Goulton*, [1893] 1 Q. B. 350. As to making an auctioneer defendant to an action for specific performance, see *Egmont* v. *Smith* (1877), 6 Ch. D. 468.

(*d*) *Farrer* v. *Lacy, Hartland & Co.* (1885), 31 Ch. D. 42.

(*e*) *Johnston* v. *Boyes*, [1899] 2 Ch. 73.

(*f*) *Burroughes* v. *Browne* (1852), 9 Hare, 609.

(*g*) It seems doubtful whether in the absence of express stipulation the vendor has the right to resell the property. See (1898), 43 Sol. J. 601; Williams, Vendor and Purchaser, Vol. I. 42.

(*h*) *Soper* v. *Arnold* (1889), 14 App. Cas. 429.

the resale sue the purchaser for the original purchase money (*i*).

If upon the resale the property realises more than the original purchase money, the purchaser cannot call for an account of the surplus (*j*); and upon this principle it has been held that when the defaulting purchaser has given an I.O.U. for the deposit, the vendor can recover the amount of the deposit and forfeit the same, although he has not in fact suffered any loss on the resale of the property (*k*). On the other hand, although the deposit is forfeited so as to prevent the purchaser from ever recovering it back, it must nevertheless be brought into account by the vendor if he seeks to recover as for a deficiency on the resale (*l*).

Forfeiture where no Express Provision.—Where there is no provision in the contract for forfeiture of the deposit, whether it is to be forfeited on the purchaser's default will depend upon the intention of the parties, to be collected from the whole instrument (*m*); but where the purchaser has so acted as to

(*i*) *Lamond* v. *Davall* (1847), 9 Q. B. 1030.

(*j*) *Ex parte Hunter* (1801), 6 Ves. jun. 94.

(*k*) *Hinton* v. *Sparkes* (1868), L. R. 3 C. P. 161; *Dewar* v. *Mintaft*, [1912] 2 K. B. 373.

(*l*) *Ockenden* v. *Henly* (1858), 27 L. J. Q. B. 361; *Howe* v. *Smith* (1887), 27 Ch. D., at p. 104; *Shuttleworth* v. *Clews*, [1910] 1 Ch. 176. Although this rule appears to have been ignored in the case of *Griffiths* v. *Vezey*, [1906] 1 Ch., at p. 798, it is conceived that this was due to a mistake in drawing up the order. The case was undefended, and *Ockenden* v. *Henly* was not cited. See *Shuttleworth* v. *Clews*, *supra*, at p. 178.

(*m*) *Palmer* v. *Temple* (1839), 9 A. & E. 508.

repudiate on his part the contract, he cannot recover the deposit from the vendor (*n*).

The authorities are conflicting upon the question whether, if the purchaser evades performing the contract on the ground that it is not sufficiently evidenced in writing to satisfy the Statute of Frauds he can recover his deposit (*o*).

Lien for Deposit.—Where the sale goes off so that the purchaser is entitled to a return of the deposit, he has a lien for it which attaches *from the moment of payment*, conditional on this, that the purchase does not go off through his own fault (*p*). He acquires a lien exactly in the same way as if on payment of a part of the purchase money the vendor had executed a mortgage to him of the estate to that extent (*q*). The purchaser may still be entitled to a lien although through delay he has lost his right to specific performance. Thus, where the vendor became bankrupt prior to completion, it was held that the purchaser was a secured creditor to the extent of his deposit, and could enforce his lien even after the lapse of ten years (*r*). It is presumed, however, that after twelve years the lien would be barred by s. 8 of the Real Property Limitation Act, 1874.

If the purchase goes off through the fault of the

(*n*) *Howe* v. *Smith* (1884), 27 Ch. D. 89; *Cornwall* v. *Henson*, [1899] 2 Ch. 715; [1900] 2 Ch. 298; *Hall* v. *Burnell*, [1911] 2 Ch. 551.

(*o*) *Cf. Thomas* v. *Brown* (1876), 1 Q. B. D. 714; and *Casson* v. *Roberts* (1862), 31 Beav. 613.

(*p*) See Williams, Vendor and Purchaser, Vol. II. 750.

(*q*) *Rose* v. *Watson* (1864), 10 H. L. Cas. 683.

(*r*) *Levy* v. *Stogdon*, [1898] 1 Ch. 478.

purchaser, of course he has no lien for his deposit (*s*). A man who declines to perform his contract can have no lien for money which he has expended in part performance of it. But the purchaser can enforce his lien not only when the contract goes off for want of title, but also where the contract is rescinded under a condition enabling the purchaser to rescind on the happening of a particular event (*t*).

If the contract is vacated by reason of a defect of title, the purchaser's lien extends not merely to the deposit and interest, but also to the costs of investigating the vendor's title (*u*), and the costs of any proceedings brought by the vendor to enforce specific performance, and the costs of a summons under the Vendor and Purchaser Act (*x*).

SECTION 4.

RESCISSION BY THE VENDOR.

Condition for Rescission.—It is now a common condition that if any objection or requisition shall be insisted upon by a purchaser, which the vendor shall be unable or unwilling to remove or comply with, he may at any time, notwithstanding any attempt to remove or comply with, or any intermediate negotiation or litigation in respect of, such requisition, by notice in writing annul the sale upon returning the

(*s*) *Dinn* v. *Grant* (1852), 5 De G. & Sm. 451; *Ridout* v. *Fowler*, [1904] 1 Ch. 658.

(*t*) *Whitbread & Co., Limited* v. *Watt*, [1902] 1 Ch. 835.

(*u*) *Kitton* v. *Hewitt*, [1904] W. N. 21.

(*x*) *Furneaux* v. *Aird*, [1906] W. N. 215.

deposit, without interest or costs of investigating title or other compensation.

This condition is construed strictly, and is only applicable to an honest case (*y*).

Objections as to Conveyance.—There is, of course, a distinction between requisitions as to *conveyance* and requisitions as to *title*, although the distinction is sometimes very refined. Requisitions requiring a legal estate (*z*) or outstanding day of a term (*a*) to be got in, requiring the concurrence of mortgagees (*b*), or of the customary heir of copyholds (*c*), or the appointment of trustees for the purposes of the Settled Land Acts (*d*), are requisitions as to the conveyance only. So also is a requisition requiring the vendor to procure admissions to copyholds (*e*), or to carry out repairs of the property for which he is liable to a tenant (*f*). On the other hand, a requisition requiring the concurrence of legatees or annuitants whom the vendor cannot compel to concur is a requisition as to title (*g*). Whenever it is a matter of conveyance and not of title, it is the duty of the vendor to do everything that he is enabled

(*y*) *Bowman* v. *Hyland* (1878), 8 Ch. D. 588.

(*z*) *Kitchen* v. *Palmer* (1877), 46 L. J. Ch. 611; *Re Deighton and Harris's Contract*, [1898] 1 Ch. 458.

(*a*) *Re Scott and Eave's Contract* (1902), 86 L. T. 617.

(*b*) *Sober* v. *Kemp* (1847), 6 Hare, 158; *Greaves* v. *Wilson* (1858), 25 Beav. 290. *Aliter*, if the mortgage debt exceeds the purchase money or the mortgage is not immediately redeemable.

(*c*) *Minton* v. *Kirwood* (1868), L. R. 3 Ch. 614.

(*d*) *Hatten* v. *Russell* (1888), 38 Ch. D. 334.

(*e*) *Re Wilson's and Stevens' Contract*, [1894] 3 Ch. 549.

(*f*) *Sale* v. *Lambert* (1874), 43 L. J. Ch. 470.

(*g*) *Page* v. *Adam* (1841), 4 Beav. 269.

to do by force of his own interest and also by force of the interests of others whom he can compel to concur in the conveyance (*h*). It has been said that it is not in general proper to make the condition as to rescission apply to requisitions as to conveyance (*i*). But it is now a common practice so to do, and even where the condition does not in terms refer to an objection as to conveyance, if it is expressed to include objections as to "the title, particulars, conditions, or any other matter or thing *relating or incidental* to the sale," this has been held to be sufficient (*k*).

The condition as to rescission which extends to objections to title applies to a case where no title at all can be made to part of the property sold (*l*), but if there has been a misrepresentation on the part of the vendor sufficient to avoid the sale, the purchaser is entitled to say, "I will avoid the contract condition and all, and will have what the law gives me apart from the condition" (*m*).

When Right to Rescind Arises.—Where the condition enables the vendor to rescind upon the purchaser *insisting* (*n*) upon, or *persisting* (*o*) in, his

(*h*) *Bain* v. *Fothergill* (1874), L. R. 7 H. L., at p. 209.

(*i*) *Hardman* v. *Child* (1885), 28 Ch. D., at p. 718. The condition may by implication be restricted to objections to title. *Kitchin* v. *Palmer* (1877), 46 L. J. Ch. 611; *Re Jackson and Oakshott* (1880), 14 Ch. D. 851.

(*k*) *Re Deighton and Harris' Contract*, [1898] 1 Ch., at p. 463.

(*l*) *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412.

(*m*) *Holliwell* v. *Seacombe*, [1906] 1 Ch. 426.

(*n*) *Greaves* v. *Wilson* (1858), 25 Beav. 290; *Duddell v. Simpson* (1866), 2 Ch. 102.

(*o*) *Mawson* v. *Fletcher* (1870), 6 Ch. 91.

requisitions, the vendor cannot exercise the power if the purchaser waives his objection at once.

But if the word "make" simply is used, the vendor's right to rescind arises directly the requisitions are sent in, without giving the purchaser any *locus pœnitentiæ* (*p*).

How Right is Lost.—The words "notwithstanding any previous litigation" refer to *pending* litigation.

Thus, where a vendor has taken out a summons under the Vendor and Purchaser Act, 1874, and judgment has been given against him, he cannot subsequently annul the sale under this condition (*q*); nor can he rescind if he has elected to insist on specific performance of the contract (*r*).

If the words "judicial decision" were used in addition to "litigation," the vendor might have this power; but such a condition would be very unfair.

The vendor does not lose his right to rescind merely because a writ or summons has been issued by the purchaser. He must acquiesce in the litigation in order to waive his rights, even though the condition only refers to intermediate *negotiation*, and not to intermediate *litigation* (*s*). Under the ordinary form of condition ("notwithstanding any intermediate or pending negotiation, proceeding, or litigation"), the vendor can rescind at any time before judgment,

(*p*) *Re Starr-Bowkett Building Society and Sibun's Contract* (1889), 42 Ch. D. 375; *Re Dames and Wood* (1885), 29 Ch. D. 626.

(*q*) *Re Arbib and Class's Contract*, [1891] 1 Ch. 601.

(*r*) *Gardom* v. *Lee* (1865), 3 H. & C. 651.

(*s*) *Isaacs* v. *Towell*, [1898] 2 Ch. 285.

but the court has jurisdiction to order the vendor to pay the costs of litigation (*t*).

Where a contract, *containing a condition for rescission*, provides that any error in the description of the property shall not annul the sale, but shall be the subject of compensation, the purchaser cannot insist upon compensation for a misdescription if the vendor chooses to exercise his right to rescind the contract (*u*).

In exercising the right of rescission the vendor must act bonâ fide and not arbitrarily or unreasonably (*x*). Although it has been said that the vendor is not bound to state to the purchaser the reason why he is unwilling or unable to comply with the requisitions (*y*), the word "unwilling" is not to be considered as giving an arbitrary power to the vendor to annul the contract. When the requisition is one which the vendor may reasonably be expected to comply with, *e.g.*, a requisition as to the date of the birth of a child (*z*), or requiring the commutation of succession duty (*a*), the vendor cannot resort to his power of rescission. The vendor is entitled to rescind if compliance with the requisition would involve him in expenses far beyond what he ever contemplated; but, even in that case, if he has been guilty of fraud

(*t*) *Re Spindler and Mear's Contract*, [1901] 1 Ch. 908.

(*u*) *Ashburner* v. *Sewell*, [1891] 3 Ch. 405; *Re Terry and White's Contract* (1886), 32 Ch. D. 14.

(*x*) *Re Dames and Wood* (1885), 29 Ch. D. 630; *Vowles* v. *Bristol Building Society* (1900), 44 Sol. J. 592.

(*y*) *Re Starr-Bowkett Building Society and Sibun's Contract* (1889), 42 Ch. D. p. 387.

(*z*) *Quinion* v. *Horne*, [1906] 1 Ch. 596.

(*a*) *Weston* v. *Thomas*, [1907] 1 Ch. 244.

or dishonesty, or, knowing the defect in his own title, has recklessly entered into the contract of sale, there is a failure of duty on his part which disentitles him to rescind (*b*).

The option to rescind should be exercised in reasonable time, and in one case, where the vendor tried to play fast and loose with the purchaser while he negotiated with a third party, the purchaser was held entitled to repudiate the contract and recover the deposit with interest at 4 per cent. (*c*).

SECTION 5.

DELIVERY OF THE ABSTRACT AND REQUISITIONS.

Time for Delivery of Abstract.—The contract sometimes provides that the vendor shall, within a given time, *e.g.*, a fortnight, deliver to the purchaser or his solicitor an abstract of the title; but the vendor is bound to deliver such abstract within a reasonable time independently of such a condition. Should a time be named for delivery of the abstract it should be delivered accordingly, and at the time of such delivery it should be as perfect as the vendor can make it (*d*). The non-delivery of a perfect abstract on the day named in the contract would have relieved a purchaser therefrom at law (*e*), though in equity the purchaser will be bound if he neglect to apply for the abstract

(*b*) *Re Jackson and Haden's Contract*, [1906] 1 Ch. 412.

(*c*) *Smith* v. *Wallace*, [1895] 1 Ch. 385.

(*d*) *Morley* v. *Cook* (1842), 2 Hare, 111.

(*e*) *Berry* v. *Young* (1788), 2 Esp. 640 n.

within a reasonable time before the day fixed for its delivery (*f*), or if, upon its being subsequently tendered, he receive it without objection (*g*); but the wilful default of a vendor to furnish an abstract within the proper time, when requested by the purchaser to do so, will entitle the purchaser in equity to be relieved from the contract when the time fixed for completion has expired (*h*).

Where no time for the delivery of an abstract is fixed by the conditions, the purchaser should give the vendor notice in writing, limiting a reasonable period within which a proper abstract must be delivered (*i*).

Time for Delivery of Requisitions.—The conditions of sale generally contain a provision that any requisition or objection arising on the abstract particulars or conditions shall be sent in within some specified period, *e.g.*, ten days after the delivery of the abstract, "otherwise the same shall be considered as waived, in which respect time shall be of the essence of the contract." According to the dicta of Lord ROMILLY, in *Hobson* v. *Bell* (*k*), the time for sending in requisitions must be computed from the delivery of a *perfect* abstract, *i.e.*, an abstract as perfect as the vendor could furnish at the time, although it may be an abstract of an imperfect title. If the abstract is

(*f*) *Guest* v. *Homfray* (1801), 5 Ves. 818; *Jones* v. *Price* (1797), 3 Anst. 924.

(*g*) *Smith* v. *Burnam* (1795), 2 Anst. 527.

(*h*) *Seton* v. *Slade* (1802), 7 Ves. 265.

(*i*) *Compton* v. *Bagley*, [1892] 1 Ch. 313.

(*k*) (1839), 2 Beav., at pp. 24, 25.

imperfect, the purchaser has the right to raise any objection *on the matter omitted*, although after the time limited by the condition (*l*); for an objection which does not arise out of the abstract delivered is not waived by not being taken within the time (*m*). It is conceived that a purchaser cannot after the expiration of the time for requisitions take an objection which arises out of the imperfect abstract; but it is a usual and prudent precaution to provide that "for the purpose of any objection or requisition an abstract shall be deemed perfect if it supply the information suggesting the same although otherwise defective."

Moreover, if the vendor does not deliver the abstract of title within the time specified in the conditions of sale, he cannot hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated in the condition for sending in the requisitions that time in that respect should be of the essence of the contract (*n*).

It has also been held that this condition does not apply to the case of a title which is wholly bad, but merely to requirements as to further information or further security which the purchaser might have properly enforced against a vendor who had a valid title or one capable of being made valid (*o*). The condition does not prevent the purchaser from raising an objection which goes to the root of the whole matter, and cannot be used for forcing a bad title on the

(*l*) *Gray* v. *Fowler* (1873), L. R. 8 Ex., at p. 280.
(*m*) *Ibid.*, p. 267; *Warde* v. *Dixon* (1858), 28 L. J. Ch. 315.
(*n*) *Upperton* v. *Nickolson* (1871), L. R. 6 Ch. 436.
(*o*) *Want* v. *Stallibrass* (1873), L. R. 8 Ex. 185.

purchaser because he has not taken the objection to matters of title within the time limited (*p*). If, however, the requisition does not go to the root of the whole matter, it cannot be taken after the time limited by the condition, and in every case the purchaser should avoid unnecessary delay in delivering his requisitions. In a recent case (*q*), JOYCE, J., distinguished between requisitions as to the root of title and the "subsequent devolution" thereof. It is, however, submitted, both on principle and authority, that the true distinction is between mere technical objections, where a good holding title is shown, and serious defects of title.

SECTION 6.

COMPENSATION FOR MISDESCRIPTION.

Effect of Condition for Compensation.—It is usual to insert a stipulation in the conditions that, if any mistake shall be made in the description of the property, or any other error whatever shall appear in the particulars, such mistake or error shall not vitiate or annul the sale, but shall be the subject of compensation to be settled by arbitration. Where there is a condition of this character, compensation can be obtained by the purchaser, even after a conveyance has been executed (*r*). In the absence of express

(*p*) *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D., at p. 437; *Saxby* v. *Thomas* (1891), 63 L. T. 695.

(*q*) *Pryce-Jones* v. *Williams*, [1902] 2 Ch. 517, at p. 522.

(*r*) *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351.

stipulation, however, compensation for a misdescription is only allowed prior to completion (*s*).

A wilful misdescription in the particulars amounting to fraud avoids the contract altogether (*t*).

In the absence of fraud, however, it is often a difficult question whether a misdescription justifies the rescission of the contract, or is merely the subject of compensation.

Cases in which the Condition does not apply.—In *Flight* v. *Booth* (*u*), which may be considered the leading case on this subject, TINDAL, C.J., laid down the law as follows: "Where the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing *which was really the subject of the sale*."

In *Flight* v. *Booth* the plaintiff had contracted to purchase leasehold premises in Covent Garden, and it was stated in the particulars that, by a clause in the lease, no *offensive* trade was to be carried on on the premises. The restriction referred to really extended

(*s*) *Clayton* v. *Leech* (1889), 41 Ch. D. 103.

(*t*) Dart, Vendors and Purchasers, 7th ed., 146; *Dimmock* v. *Hallett* (1886), 2 Ch. 21, as explained by LINDLEY, L.J., in *Re Terry and White's Contract* (1886), 32 Ch. D. 29.

(*u*) (1834), 1 Bing. N. C. 370.

to many trades of a perfectly *inoffensive* character, and the misdescription was held to be fatal. The vendor cannot treat the existence of undisclosed *restrictive covenants* as coming within the condition as to compensation, except in the case of a sale to a school board, which is not bound by the restrictions, but is liable to pay compensation to the covenantee under s. 68 of the Lands Clauses Act (*v*). It is almost impossible to assess compensation for covenants of this nature (*x*), but it is presumed that if the purchaser chooses to treat the defect as coming within the condition, he is entitled to do so (*y*), although, when there is no condition as to compensation, he must either repudiate the contract or pay the full purchase price (*z*).

In *Jones* v. *Edney* (*a*), a public-house, which was the subject-matter of the sale, was described in the particulars as "free," whereas it was in reality a tied house, and the contract was held to be avoided.

Again, in the case of *Re Arnold* (*b*) the vendor contracted to sell a farm, and an important close comprised in the farm was described in the particulars as a field of four acres, and was marked on the plan as a separate field. It appeared, however, that the vendor only possessed four undivided sevenths of a seven-acre field. The purchaser was released from

(*v*) *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437.
(*x*) *Cato* v. *Thompson* (1882), 9 Q. B. D. 616.
(*y*) *Cf. Chifferiel* v. *Watson* (1888), 40 Ch. D. 45.
(*z*) *Rudd* v. *Lascelles*, [1900] 1 Ch. 815.
(*a*) (1812), 3 Camp. 285.
(*b*) (1880), 14 Ch. D. 270.

his bargain, for a man cannot be obliged to take a thing with compensation when the thing is substantially and materially different from that which he was induced by the representations made to him to believe that he had bought. A similar decision was arrived at in *Dobell* v. *Hutchinson* (c), where a yard which appeared in the particulars as comprised in the property sold was in reality held by the vendor as a yearly tenant. Again, where the question of *frontage* is important, a vendor's inability to show a title to a wall included in the particulars may be sufficient to annul the contract (d).

Defects of Title.—A condition providing for compensation in the case of errors in the *description* of the property does not apply to such a defect of title as an underlease described as a lease, but means a misdescription as to the corporeal property (e); and the same principle would seem to apply to the ordinary condition as to any error, misstatement, or omission in the *particulars*, for "it is not the function of the particulars to deal with title at all" (f). But a defect of title may amount merely to a question of *parcels*, *e.g.*, where a parcel of land to which the vendor has no title is included in the acreage (g), or where the vendor purports to include in the sale minerals under the land to which he is not

(c) (1835), 3 A. & E. 355.

(d) *Brewer* v. *Brown* (1884), 28 Ch. D. 309; *Perkins* v. *Ede* (1852), 16 Beav. 193.

(e) *Re Beyfus and Masters' Contract* (1888), 39 Ch. D. 110.

(f) *Blaiberg* v. *Keeves*, [1906] 2 Ch., at p. 184.

(g) *Ashburner* v. *Sewell*, [1891] 3 Ch., at p. 409.

entitled (*h*), or the barrel of a sewer vested in the local authority (*i*); and in that case, although if the defect is material the purchaser may be entitled to annul the contract, the defect falls, it is conceived, within the condition as to compensation. On this point it is submitted that the decision of BYRNE, J., in *Debenham* v. *Sawbridge* (*k*), where a cellar comprised in the particulars belonged to a third party, cannot be supported.

What is subject to Compensation.—The purchaser is entitled to be relieved from his contract if there is a *material* deficiency in the dimensions of the property, but every variance from the description in the particulars will not enable the purchaser to resist specific performance. In one case (*l*), a misdescription as to quantity, amounting to 339 square yards, was held to fall within the condition as to compensation. COTTON, L.J., in his judgment (*m*), said: "I do not say that such a difference of quantity as exists here would not in any case alter the substance of what a purchaser intended to buy, but here what he intended to buy was a well-defined and fenced-off property." The decision must depend upon the circumstances of each case (*n*).

In one case (*o*) it was held that the existence of a

(*h*) *Ibid.*, at p. 410; *Re Jackson and Haden's Contract*, [1906] 1 Ch., at pp. 423, 424, 426.

(*i*) *Re Brewer and Hankins' Contract* (1899), 80 L. T. 127.

(*k*) [1901] 2 Ch. 98.

(*l*) *Re Fawcett and Holmes* (1889), 42 Ch. D. 150.

(*m*) *Ibid.*, at p. 158.

(*n*) *Cf. Dyer* v. *Hargrave* (1805), 10 Ves. 505.

(*o*) *Re Brewer and Hankins' Contract* (1899), 80 L. T. 127.

public sewer under the property, which was not known to the vendor at the time of the sale, fell within the condition as to compensation, and that the purchaser was bound by the contract. But the circumstances of this case were very special (p), and it is submitted that, as a general rule, the existence of such a *sewer* would be considered a fatal defect (q), although the existence of a *drain* from an adjoining house would clearly come within the condition (r).

The fact that the land sold is subject to a dower has always been considered a subject for compensation, and does not entitle the purchaser to repudiate (s).

Generally it may be laid down that if the purchaser does not get substantially what he contracted to buy he may be entitled to say that he will not have compensation for it. *A fortiori* when he is excluded from compensation (t).

Condition excluding Right to Compensation.—In some cases the condition stipulates not only that a misdescription shall not annul the sale, but that *no* compensation shall be allowed in respect thereof.

In such a case, the court will not, where the misdescription is a substantial one, enforce specific performance against the purchaser, with or without compensation (u).

(p) *Re Puckett and Smiths' Contract*, [1902] 2 Ch., at p. 265, and see *Shepherd* v. *Croft*, [1911] 1 Ch. 521.

(q) *Pemsel* v. *Tucker*, [1907] 2 Ch. 191.

(r) *Vowles* v. *Bristol Building Society* (1900), 44 Sol. J. 592.

(s) *Brewer* v. *Broadwood* (1882), 22 Ch. D., at p. 107.

(t) *Jacobs* v. *Revell*, [1900] 2 Ch., at p. 864.

(u) *Whittemore* v. *Whittemore* (1869), L. R. 8 Eq. 603.

Thus, where the property was described as "bordering on a fine sheet of ornamental water" known as Shortwood Lake, the inability of the vendor to make a title to a rood and a half of land which separated the rest of the property from the lake was held to be fatal (*x*). Again, where the particulars represented that there was a good water supply, and it turned out that water could only be obtained with the consent of a neighbour who could at any time refuse his permission, the purchaser was held to be entitled to rescind the contract (*y*).

On the other hand, the purchaser is precluded from insisting on specific performance, with compensation for the misdescription (*z*). If the purchaser wishes to enforce the contract, he must do so at the price originally stipulated (*a*), and cannot obtain specific performance at a reduced price.

Under a general compensation clause, it is presumed that the vendor may claim to have the purchase money increased by way of compensation when the land sold is in excess of the dimensions stated in the particulars (*b*). Notwithstanding the decision of KAY, J., in *Lett* v. *Randall* (*c*), it is submitted that evidence is admissible to show that the purchaser claiming compensation was not in fact deceived by the

(*x*) *Jacobs* v. *Revell*, [1900] 2 Ch. 858.

(*y*) *Re Evershed Trustees and Champion's Contract* (1900), 45 Sol. J. 44.

(*z*) *Re Terry and White's Contract* (1886), 32 Ch. D. 14.

(*a*) *Cordingley* v. *Cheesebrough* (1862), 3 Gif. 496.

(*b*) *Cf. Leslie* v. *Tompson* (1851), 9 Hare, 268; *Re Orange and Wright's Contract* (1885), 52 L. T. 606.

(*c*) (1883), 49 L. T. 71.

misdescription (*d*); but even though the purchaser is tenant of the premises, he is not presumed to know their correct measurement (*e*).

SECTION 7.

RESTRICTIVE STIPULATIONS GENERALLY.

Construction of Restrictive Conditions.—We now come to consider the stipulations frequently inserted in contracts for sale and purchase of real estate restrictive of the purchaser's right to such a deduction of title as in the absence of such stipulations he would be entitled to call for; and with reference to stipulations of this character, and, in fact, to all stipulations having a restrictive tendency, it is to be remarked that such stipulations must be expressed in terms the most clear and unambiguous (*f*); and if there be any misapprehension as to their meaning, they will be construed in favour of the person whose rights are restricted (*g*).

Concurrence of Beneficiaries.—Thus a condition on a sale by trustees that the remaindermen or their assigns shall, if required, join in the conveyance to the purchaser, amounts to a warranty that the remaindermen, or those representing them, are in a position to join in an effectual conveyance (*h*).

(*d*) *Cobbett* v. *Locke-King* (1900), 16 T. L. R. 379.

(*e*) *King* v. *Wilson* (1843), 6 Beav. 128.

(*f*) *Symons* v. *James* (1842), 1 Y. & C. C. C. 487.

(*g*) *Osborne* v. *Harvey* (1846), 7 Jur. 229; *Seaton* v. *Mapp* (1846), 2 Coll. 556; *Drysdale* v. *Mace* (1854), 5 De G. M. & G. 103.

(*h*) *Mosley* v. *Hide* (1851), 20 L. J. Q. B. 539.

If the condition stipulates that the purchaser shall not be entitled to require the concurrence of the beneficiaries, this does not preclude the purchaser from taking the objection that the vendor has no power to sell without such concurrence (*i*); unless the condition expressly provides that the purchaser shall accept the title of the vendor as trustee for sale (*k*).

Depreciatory Conditions by Trustees.—Persons acting in a fiduciary character, as we have seen, are usually authorised, by the document under which they derive their powers, to sell, subject to such special or other stipulations, either as to title or evidence of title as they may think fit, and such an authority is implied by statute in the case of instruments coming into operation after December 31st, 1881 (*l*). The words "may think fit" must, of course, be construed as meaning, may honestly think fit in a proper exercise of their discretion (*m*). Trustees are not justified in using special conditions, which depreciate the property, where there is no necessity for them (*n*).

Before conveyance, a sale by trustees may be impeached if it appears that the consideration has been rendered inadequate by the depreciatory nature of the conditions (*o*); but no conveyance can be upset on

(*i*) *Re Molyneux and White* (1884), 15 L. R. Ir. 383.

(*k*) *Wilkinson* v. *Hartley* (1852), 15 Beav. 183.

(*l*) Trustee Act, 1893, s. 13.

(*m*) *Cf. Smith* v. *Thompson*, [1896] 1 Ch. 71.

(*n*) *Dance* v. *Goldingham* (1873), L. R. 8 Ch. 902; *Dunn* v. *Flood* (1885), 28 Ch. D. 586.

(*o*) Trustee Act, 1893, s. 14 (1).

this ground unless there has been collusion between the purchaser and the trustees (*p*).

SECTION 8.

COMMENCEMENT OF TITLE.

Conditions restricting Investigation of Title.—One of the most common conditions restrictive of the rights of a purchaser with reference to title is as to the commencement thereof.

The Conveyancing Act, 1881, s. 3 (3), provides that:

"A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed."

Investigation of Prior Title.—A condition that the abstract shall commence with a specified document will not preclude the purchaser from investigating the earlier title *aliunde*, if he has the means of doing so (*q*); but the fact that recited instruments appear

(*p*) Trustee Act, 1893, s. 14 (2).

(*q*) *Sellick* v. *Trevor* (1843), 11 M. & W. 722; *Darlington* v. *Hamilton* (1854), Kay, 550.

from such recitals to be of a suspicious character will not, it is conceived, entitle him to make requisitions as to them (*r*).

Moreover, the condition may be framed in such a way as to preclude inquiry and investigation for every purpose (*s*). Such a condition is construed strictly, and must be expressed in clear and unambiguous language (*t*).

The following condition seems to answer this purpose, viz., "The title shall commence with an indenture of, etc., and the prior title, *whether appearing in any abstracted document or not*, shall not be required, investigated or objected to."

If, however, the vendor discloses some blot on the prior title which was not discovered through any inquiry made by the purchaser, the purchaser is not precluded by the condition from raising the objection (*u*); and any misrepresentation (although not amounting to fraud) as to the prior title invalidates the contract (*x*).

When Conditions misleading.—It sometimes happens that a title cannot be proved in every step, and a condition should in that case be inserted precluding the purchaser from making any objection or requisition as to the *intermediate* title to the premises

(*r*) *Re Scott and Alvarez's Contract*, [1895] 1 Ch. 596.

(*s*) *Hume* v. *Bentley* (1852), 5 De G. & Sm. 520; *Re National Provincial Bank of England and Marsh*, [1895] 1 Ch. 190.

(*t*) *Waddell* v. *Wolfe* (1874), L. R. 9 Q. B. 515.

(*u*) *Warren* v. *Richardson* (1830), You. 1; *Smith* v. *Robinson* (1879), 13 Ch. D. 148.

(*x*) *Nottingham Patent Brick and Tile Co.* v. *Butler* (1886), 16 Q. B. D., at p. 790.

between the root of title and some subsequent instrument. A purchaser is bound by the conditions restricting his right of inquiry, unless he can show that they are misleading. A condition is misleading if it contains a statement by the vendor which he knows to be untrue (*y*); or if the vendor, knowing he has a *bad* (as opposed to a *doubtful*) title, tries to palm it off upon the purchaser (*z*).

But where a vendor cannot explain a particular transaction, he may stipulate that the purchaser shall not inquire into it; and if he believes a statement to be true, but is not in a position to establish it by legal proof, he may, by an express condition, preclude the purchaser from insisting on such proof (*a*). If this were not so, it would be impossible to protect a vendor against a difficult and doubtful title, and many properties would become absolutely unsaleable. Thus when it was an open question whether a rent which had not been paid for fifty years had been released, a vendor was held to be justified in requiring the purchaser by the conditions to presume a release, and in describing the property as freehold in the particulars (*b*).

Condition for such Title as the Vendor has.—A vendor may stipulate for the production only of such title, or evidence of title as he may have; and a purchaser, under such a stipulation, will be bound,

(*y*) *Re Banister* (1879), 12 Ch. D. 131.

(*z*) *Re Scott and Alvarez's Contract*, [1895] 1 Ch., at p. 605.

(*a*) *Re Sandbach and Edmondson's Contract*, [1891] 1 Ch. 99.

(*b*) *Blaiberg* v. *Keeves*, [1906] 2 Ch. 175.

although the title may be defective (*c*); but this condition does not relieve the vendor from the obligation to make out the best title he can from the materials he possesses, or from paying off a mortgage on the property (*d*). A stipulation that a purchaser shall be entitled to the production only of such of the documents of title as are in the vendor's possession, will not preclude the purchaser from requiring a good title to be deduced and otherwise satisfactorily verified (*e*); and where the contract states as a fact that the vendor has power to sell the fee, the purchaser is entitled to require the vendor to show such power (*f*).

A condition that "the vendor's title is accepted by the purchaser" is not binding if the vendor has failed to disclose onerous covenants affecting the property. The purchaser has a right to assume when such a condition is inserted that the vendor has disclosed what it was his duty to disclose (*g*).

SECTION 9.

PRODUCTION OF TITLE-DEEDS FOR INSPECTION.

Obligation of Vendor to produce Deeds.—In the absence of stipulation to the contrary, the vendor

(*c*) *Freme* v. *Wright* (1819), 4 Madd. 364; *Wilmot* v. *Wilkinson* (1827), 6 B. & C. 506; *Duke* v. *Barnett* (1846), 2 Coll. C. C. 327; *Hume* v. *Pocock* (1866), L. R. 1 Ch. 379. But as to specific performance, see p. 388.

(*d*) *Keyse* v. *Haydon* (1853), 20 L. T. 244; *Goold* v. *Birmingham, Dudley, etc. Bank* (1888), 4 T. L. R. 413.

(*e*) *Southby* v. *Hutt* (1837), 2 My. & Cr. 207.

(*f*) *Johnson* v. *Smiley* (1853), 17 Beav. 223.

(*g*) *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666.

must produce for examination with the abstract all documents of title since the root of title (*h*), except instruments on record, whether in his possession or not, and although he may only have a covenant or acknowledgment for their production. And the purchaser ought to require that all title-deeds be produced for his inspection, for an omission to make inquiry as to the title-deeds, although not "fraudulent or culpable," has been held to be such gross negligence as to postpone the purchaser of the legal estate to a prior equitable mortgagee (*i*), and even to a *subsequent* equitable estate the creation whereof has been rendered possible by the possession of deeds which ought to have passed into the custody of the purchaser (*k*). It was held in an old case that a purchaser who agrees not to require an abstract is nevertheless entitled to inspect the title-deeds (*l*).

If a deed has been lost or destroyed, it is incumbent on the vendor to produce sufficient evidence of loss, and also to prove the execution and delivery of the lost document (*m*). In this case, therefore, it is desirable to provide by an express condition that no objection or requisition shall be made in respect of the loss and non-production of the deed.

The Conveyancing Act, 1881, s. 3 (6), provides:

"On a sale of any property, the expenses of the production and inspection of all Acts of Parliament,

(*h*) Conveyancing Act, 1881, s. 3 (3).

(*i*) *Oliver* v. *Hinton*, [1899] 2 Ch. 264; *Berwick & Co.* v. *Price*, [1905] 1 Ch., at p. 640.

(*k*) *Walker* v. *Linom*, [1907] 2 Ch. 104.

(*l*) *Harding* v. ——— (1826), 4 L. J. (O.S.) Ch. 213.

(*m*) *Ante*, pp. 269, 270.

inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."

Notwithstanding this sub-section, it is still the duty of the vendor, as we have seen, to furnish a proper and complete abstract of title at his own expense, even when the contract provides for "free conveyances" (*n*). But when it comes to verifying the abstract by the production of deeds not in the vendor's possession, the whole expense is thrown on the purchaser by this section, unless a contrary intention is expressed in the contract of sale (*o*). It seems that a vendor who has

(*n*) *Re Johnson and Tustin* (1885), 30 Ch. D. 42, *ante*, pp. 153, 154.

(*o*) Conveyancing Act, 1881, s. 3 (9); and *cf.* *Re Willett and Argenti* (1889), 60 L. T. 735.

not any of his title-deeds in his possession may enter into a contract of sale without disclosing that fact, or making any condition, throwing the expense upon the purchaser of ascertaining where they are. Thus, where the purchaser makes a requisition as to the production of the title-deeds, the vendor may safely answer, "I do not know where they are; and if you want to know, I will find out at your expense" (p).

SECTION 10.

CUSTODY OF TITLE-DEEDS.

Right of Purchaser to Deeds.—The custody of the title-deeds after completion is frequently the subject of special conditions, but in the absence of express stipulation, the purchaser is entitled to all deeds and documents, *however ancient*, which are in the possession or power of the vendor, unless the vendor retains part of the estate to which such muniments relate (q). The vendor must bear the expense of obtaining title-deeds required by the purchaser to be handed over on completion, although such title-deeds are not in the vendor's possession, and are not referred to in the abstract. The mere fact that obtaining the deeds for the purpose of handing them over on completion may cause the vendor expense is no answer to the purchaser (r).

The right to the deeds goes with the land; and the

(p) *Re Stuart and Olivant and Seadon's Contract*, [1896] 2 Ch. 328.

(q) See Dart, Vendors and Purchasers, 7th ed., 693.

(r) *Re Duthy and Jesson's Contract*, [1898] 1 Ch. 419.

owner of land is entitled to the custody of the title-deeds relating to it, and can maintain an action for them even though the conveyance to him contains no express grant of the deeds (*s*). Where, however, title-deeds relate to two or more portions of an estate which is held by tenants in common, if any one of the interested parties gets possession of the deeds, none of the other parties can get them from him, for no one can show a better title than the one he has (*t*).

A vendor, having entered into a covenant for production of deeds to a former purchaser, is not justified in refusing to deliver the deeds to the second purchaser if he will allow notice of the covenant to be placed upon his conveyance, and will covenant to perform the prior covenant or acknowledgment, or acknowledge the right of the first purchaser to production in case the vendor's first covenant or acknowledgment was made determinable upon his procuring a substituted covenant (*u*); if, therefore, in the face of this, the vendor is desirous of retaining the deeds, the contract should stipulate accordingly.

If the contract does not provide for the custody of the deeds on a sale in lots, the purchaser whose purchase money is largest in amount will be entitled to them.

If the contract provides that the title-deeds are to be delivered to the purchaser of the largest lot, the purchaser of the largest lot in value and extent will be entitled to them in preference to a purchaser of

(*s*) *Re Williams and Duchess of Newcastle's Contract*, [1897] 2 Ch. 148.

(*t*) *Wright* v. *Robotham* (1886), 33 Ch. D. 108.

(*u*) Sugden, Vendors and Purchasers, 435.

several lots whose aggregate value and extent exceeds that of the largest lot (*x*); and a provision making the purchaser of the "largest lot" entitled to the deeds, means the purchaser of the largest lot in superficial area (*y*).

Retainer of Deeds by the Vendor.—By the fifth rule of s. 2 of the Vendor and Purchaser Act, 1874, it is provided that, "Where the vendor retains any part of an *estate* to which any documents of title relate he shall be entitled to retain such documents." "Estate" in this rule means an *estate in land*, that is, land with the enlarged meaning given to the word by s. 3 of the Interpretation Act, 1889, viz., a freehold, copyhold, or leasehold estate in land. Thus, on a sale by a mortgagee, under a mortgage deed which comprises land and also policies of insurance upon the life of the mortgagor, the purchaser of the land is entitled to the custody of the mortgage deed although the vendor retains the policies (*z*).

But all deeds relating to the *title of the land* retained by the vendor, such as deeds showing the extinguishment of an incumbrance or easement over such land, fall within the rule and cannot be claimed by the purchaser (*a*).

Right of Purchaser to Attested Copies.—Where the vendor retains the title-deeds, the purchaser is

(*x*) *Scott* v. *Jackman* (1855), 21 Beav. 110.

(*y*) *Griffiths* v. *Hatchard* (1854), 1 Kay & J. 17.

(*z*) *Re Williams and Duchess of Newcastle's Contract*, [1897] 2 Ch. 144.

(*a*) *Re Lehmann and Walker's Contract*, [1906] 2 Ch. 640.

entitled to have attested copies furnished to him by the vendor (*b*), but the Conveyancing Act, as we have seen (*c*), throws the expense thereof on the purchaser.

Right of Purchaser to Covenant for Production.—The purchaser is also entitled to a covenant or statutory acknowledgment from the vendor of the right of the purchaser to production of title-deeds which are not handed over on completion. The purchaser is not, however, entitled to a covenant or acknowledgment for production of deeds which were merely produced for the purpose of showing that they did not contain anything affecting the title (*d*), and when he is buying a *part* only of the vendor's property he cannot require a covenant or acknowledgment as to deeds not included in the abstract of title (*e*).

It would seem that *instruments on record*, such as orders of the court, probates of wills, etc., should be included in the covenant or acknowledgment if in the custody of the vendor, but in practice this is seldom done (*f*), and the vendor is not under any obligation to procure a covenant for the production of any document which it is in fact impossible to produce; although he is bound to furnish sufficient evidence of its contents (*g*).

The vendor's liability to give a covenant for

(*b*) *Dare* v. *Tucker* (1801), 6 Ves. 460.

(*c*) *Ante*, pp. 312, 313.

(*d*) Sugden, Vendors and Purchasers, 14th ed., 452.

(*e*) *Re Guest and Worth*, STIRLING, J., in chambers, May 20th, 1889.

(*f*) Copinger, 144, 145.

(*g*) *Halkett* v. *Dudley*, [1907] 1 Ch., at pp. 603, 604.

production is now, as a general rule, satisfied by an acknowledgment of right to production under the Conveyancing Act (*h*). It must, however, be borne in mind that a statutory acknowledgment is of no effect except as to documents in the possession of the person giving the same. Thus, if the deeds are in the custody of a third party (*e.g.*, a mortgagee) who refuses to give an acknowledgment, the vendor must enter into a covenant for production (*i*).

Indorsement on Title-Deeds.—A memorandum of the acknowledgment or covenant for production is sometimes indorsed on the title-deeds retained by the vendor (*k*). Although it is presumed that a purchaser who obtains the legal estate cannot insist on such an indorsement, attention to this precaution would often prevent fraud where the vendor retains a deed which makes him the ostensible owner of a larger estate than according to the existing facts belongs to him (*l*).

A purchaser is now entitled, notwithstanding any stipulation to the contrary, that a memorandum giving notice of any provision contained in the disposition to him restrictive of uses of, or giving rights over, any other land comprised in the common title shall, where practicable, be indorsed on, or, where impracticable, be permanently annexed to, some one document selected by him but retained in the possession or power of the vendor and being or forming part of the common title (*m*).

(*h*) See *post*, p. 322.

(*i*) *Re Pursell and Deakin's Contract*, [1893] W. N. 152.

(*k*) Dart, Vendors and Purchasers, 6th ed., 766.

(*l*) *Keates* v. *Lyon* (1869), L. R. 4 Ch., at p. 226.

(*m*) Conveyancing Act, 1911, s. 11, *post*, p. 360.

Costs of Covenants and Acknowledgments.—Rule 4 of s. 2 of the Vendor and Purchaser Act provides that "such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser." Although, therefore, the expense of preparing and engrossing covenants for production, and the stamp, falls on the purchaser, the expense of procuring their execution falls on the vendor (*n*).

Limit of Covenantor's Liability.—The covenant formerly provided for its determination on delivery of the deeds to a future purchaser, who should enter into a covenant for their production; and where the vendor was not beneficially interested in the estate, it was usual for the contract to restrict the operation of the covenant, so far as it involved a personal liability, to such period as the deeds remained in the actual custody of the covenantor or his representative. These provisions are now unnecessary in the case of acknowledgments, because the Conveyancing and Law of Property Act, 1881, s. 9 (9), confines the liability for the production of deeds, under the acknowledgment there provided for, to each individual possessor or person so long only as he has possession or control of the documents, the right to the production of which is acknowledged.

Equitable Right to Production.—Should the purchase be completed without an acknowledgment

(*n*) Coventry, Conv. Evid. 133.

being given for production, the purchaser is nevertheless entitled in equity to have the deeds produced to him (o), and the inability of the vendor to furnish the purchaser with a legal covenant or acknowledgment for production and furnishing copies of documents of title is not an objection to title in case the purchaser will, on completion of the contract, have an equitable right to the production of such documents (p).

Undertaking for Safe Custody.—An ordinary vendor is bound (in the absence of stipulation to the contrary) to give an undertaking for the safe custody (q) of documents retained by him, and it is presumed that the benefit of the statutory undertaking devolves in the same manner as an acknowledgment. In the case of trustees and mortgagees the contract should stipulate that no undertaking will be given (r).

Provisions of the Conveyancing Act.—For the convenience of the reader the provisions contained in s. 9 of the Conveyancing and Law of Property Act, 1881, relating to the production and safe custody of title-deeds are given *in extenso :*

"(1) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(o) *Fain* v. *Ayers* (1826), 2 Sim. & St. 533.

(p) See the Vendor and Purchaser Act, 1874, s. 2, r. 3.

(q) See *post*, p. 322.

(r) See Key and Elphinstone's Precedents, Vol. I., 428. Whether a trustee or mortgagee can in any case be made to give an undertaking seems doubtful. See 29 Sol. J. 215.

"(2) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

"(3) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

"(4) The obligations imposed under this section by an acknowledgment are—

"(i) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorised in writing; and

"(ii) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

"(iii) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

"(5) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

"(6) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

"(7) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

"(8) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

"(9) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

"(10) Any person claiming to be entitled to the benefit of such an undertaking may apply to the court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

"(11) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

"(12) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by

the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

"(13) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

"(14) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act."

SECTION 11.

IDENTITY OF PARCELS.

Obligation of Vendor to prove Identity.—In the absence of any stipulation in the contract to the contrary a purchaser is entitled to be furnished with satisfactory evidence of the identity of the parcels, but it is common to find a stipulation by the contract that the purchaser shall admit the identity of the parcels of the estate sold, upon the evidence afforded by comparison of the description in the contract and the muniments, and that further evidence of identity shall not be called for. But such provision, unless framed to meet the particular discrepancy, will not relieve the vendor from pointing out the entire property proposed to be sold (*s*), or preclude a purchaser from requiring evidence of identity if the descriptions of the parcels in the contract vary from those in the abstracted documents (*t*). And where it was provided that the purchaser should not require any further proof of identity than was furnished by the title-deeds, it was held that a good title was not made under the contract, inasmuch as the contract

(*s*) *Robinson* v. *Musgrove* (1838), 2 Moo. & R. 92.

(*t*) *Flower* v. *Hartopp* (1843), 6 Beav. 476.

was, in effect, that the deeds should show identity, and no identity was in fact shown (*u*).

So far as regards copyholds, if it can be shown that the property has been held under the descriptions thereof on the court rolls, mere vagueness in such description will be unimportant (*v*).

Mixed Freeholds and Copyholds.—Upon a sale of lands of different tenures, or copyholds held of different manors, it is usual to stipulate that the vendor shall not be required to distinguish the particular lands held under each tenure or manor, and in the absence of such a stipulation the lands of each tenure or manor would have to be identified (*x*).

SECTION 12.

RECITALS—EASEMENTS—NON-REGISTRATION, ETC.

Recitals.—The Vendor and Purchaser Act, 1874, provides, as we have seen (*y*), that recitals, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence (*z*). It has been held by MALINS, V.C., that under this rule, a recital in a conveyance more than twenty years old that the vendor was seised in fee is sufficient evidence of that

(*u*) *Carling* v. *Austin* (1862), 2 Dr. & Sm. 129.

(*v*) *Long* v. *Collier* (1828), 4 Russ. 267.

(*x*) *Monro* v. *Taylor* (1848), 8 Hare, 66; *Dawson* v. *Brinckman* (1858), 3 Mac. & G. 53; *Crosse* v. *Lawrence* (1852), 9 Hare, 462; and *cf. Searle* v. *Cook* (1889), 43 Ch. D. 519.

(*y*) *Ante*, p. 274.

(*z*) 37 & 38 Vict. c. 78, s. 2, r. 2.

fact, and that no prior abstract of title can be required (*a*). In that case the seisin was recited, not as a conclusion of law from the preceding circumstances, but as a positive and distinct fact. If you state that as a fact which involves a conclusion of law, that is still a statement of fact and not a statement of law. It may, however, as pointed out in previous editions, be doubted whether the purchaser is not entitled to an abstract of a forty years' title in order to ascertain whether the recital is accurate; and in a recent case, SWINFEN EADY, J., declined to follow the decision of MALINS, V.C. (*b*).

The Conveyancing Act, 1881, s. 3 (3), provides that a purchaser shall assume, unless the contrary appears, that the recitals contained in any abstracted instruments of any deed, will, or other document prior to the root of title are correct and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgment, enrolment, or otherwise (*c*).

Easements.—A statement that the property is sold subject to all rights of way and water and other easements (if any) existing over or upon the same, is frequently inserted in the contract. It is presumed, however, that a general condition of this kind does

(*a*) *Bolton* v. *London School Board* (1878), 7 Ch. D. 766.

(*b*) *Re Wallis and Grout's Contract*, [1906] 2 Ch. 206.

(*c*) This does not prevent an objection founded on something which appears in the description of the property agreed to be sold. *Re Lloyd's Bank and Lillington's Contract*, [1912] 1 Ch. 601.

not relieve the vendor from the duty to disclose the existence of an easement if he is aware of its existence (*d*). When property belonging to the vendor is sold in lots, this condition does not confer any right of way or water as between one lot and another, and if the vendor desires that any one lot shall enjoy an easement over another, this should be expressly provided for (*e*). If the property is stated in the contract to be free from land tax or tithe, and the vendor has no proof in support of such statement in his possession, it is usual to provide that no inquiry shall be made on the point, as in the absence of such a stipulation the vendor would be bound to produce evidence of redemption. Upon a sale of enfranchised copyholds the minerals and other rights reserved to the lord by the Copyhold Acts should be excepted from the sale (*f*).

Legacies, etc.—A condition is sometimes inserted that "no evidence shall be required of the payment or discharge of any legacy or sum of money charged on the property which became payable twelve years or upwards prior to the day of sale." Under this condition a purchaser has been held to be precluded from requiring a conditional surrender of copyholds to be vacated (*g*).

Registration.—If the estate is situate in a register county, it is usual to provide that no objection shall

(*d*) See Dart, Vendors and Purchasers, 7th ed., 172.
(*e*) *Russell* v. *Harford* (1866), L. R. 2 Eq. 507.
(*f*) *Upperton* v. *Nickolson* (1871), L. R. 6 Ch. 436.
(*g*) *Hopkinson* v. *Chamberlain*, [1908] 1 Ch. 853.

be taken on account of the non-registration of any document of title (if any) not registered, and to stipulate that the expense of registering such document, if the purchaser require it registered, shall be borne by him.

Unstamped Documents.—In the absence of express stipulation, the expense of stamping all documents of title including a lease or tenancy agreement, subject to which the property is sold, falls on the vendor (*h*). It is, therefore, usual to insert a condition that the expense of stamping unstamped or insufficiently stamped documents shall be borne by the purchaser. It is assumed, however, that it should not be provided that a document unstamped or insufficiently stamped shall not be stamped, as such a provision might be held to be a contract prejudicial to the revenue, and as such not enforceable (*i*). It is now, moreover, enacted by s. 117 of the Stamp Act, 1891, that every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument *executed after May 16th*, 1888, and every contract, arrangement or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument, or indemnifying against such liability, absence, or insufficiency, shall be void.

(*h*) *Coleman* v. *Coleman* (1898), 79 L. T. 66.

(*i*) *Smith* v. *Mawhood* (1846), 14 M. & W. 452; *Nixon* v. *Albion Marine Insurance Co.* (1867), L. R. 2 Ex. 338. See also *Whiting* to *Loomes* (1880), 14 Ch. D. 822.

SECTION 13.

COSTS OF CONVEYANCE AND OF GETTING IN OUTSTANDING ESTATES.

Costs of Conveyance.—In the absence of express stipulation, the purchaser prepares and pays for the preparation of the conveyance, but the costs of *perusal* and *execution* by all necessary conveying parties fall on the vendor (*j*).

Outstanding Estates.—The contract frequently provides that every assurance and act which may be required by the purchaser for getting in, surrendering or releasing any outstanding estate, or for completing the vendor's title, shall be prepared at the expense of the purchaser.

In the absence of such a stipulation, outstanding estates and incumbrances must be got in at the vendor's expense, by deeds distinct from the conveyance, or the purchaser may require the vendor to bear the increased expense of the purchase deed by reason of the concurrence of trustees and incumbrances therein (*k*). But such expense would not be thrown upon the vendor if the incumbrances be kept on foot for the purchaser's protection (*l*).

In a case where, after contract signed, the vendor died, having devised the legal estate to an infant, it was held that his estate must bear the expense of a suit thus rendered necessary, but it was otherwise

(*j*) Dart, Vendors and Purchasers, 7th ed., 714.
(*k*) *Reeves* v. *Gill* (1838), 1 Beav. 375.
(*l*) *Cooper* v. *Cartwright* (1860), Johns. 679.

if he died intestate, leaving an infant heir (*m*). It is presumed that this rule still applies in the case of copyholds.

When the conditions of sale stipulate that the *conveyance* is to be made at the expense of the purchaser, although the purchaser must pay the costs of a conveyance or surrender by the vendor, he is not bound to bear the expense of procuring the concurrence of other proper parties (*n*). Again, where by the conditions a proper assurance and "every other *instrument* required for getting in or releasing any outstanding estate, right, or interest, etc.," is to be *prepared* by and at the expense of the purchaser, the expense of procuring the concurrence of mortgagees still falls on the vendor (*o*). On the other hand, if the condition stipulates that the assurance and "every other *act and thing* required by the purchaser for perfecting or completing the vendor's title, or otherwise shall be prepared, obtained, *made* and *done* by and at the expense of the purchaser," the contract throws the expense of procuring the concurrence of mortgagees on the purchaser (*p*), although the vendor must, at his own expense, furnish an abstract deducing a title to any outstanding legal estate (*q*).

(*m*) *Purser* v. *Darby* (1857), 4 Kay. & J. 41; *Barker* v. *Venables* (1864), 11 Jur. (N.S.) 480.

(*n*) *Paramore* v. *Greenslade* (1853), 1 Sm. & G., at p. 544.

(*o*) *Re Sander and Walford's Contract* (1900), 83 L. T. 316.

(*p*) *Re Willett and Argenti* (1889), W. N. 66.

(*q*) *Re Adam's Trustees and Frost's Contract*, [1907] 1 Ch., at pp. 703, 704.

SECTION 14.

APPORTIONMENT AS BETWEEN THE LAND SOLD AND OTHER LAND.

Rent.—When a portion only of property subject to a lease at an entire rent is sold or the whole property is sold in lots, provision should be made by the contract for the apportionment of the rent, and if the tenant's concurrence in the apportionment cannot be obtained (without which no legal apportionment can be made (*r*)), the purchaser should be precluded from taking any objection on that account.

So, too, in the converse case of a lessee selling a property in lots which is held under one demise, unless the lessor is willing to concur, some provision for apportionment must be made in the conditions (*s*). A provision that the assignee shall pay the apportioned rent and keep the assignor indemnified against it will not increase the *ad valorem* stamp duty on the conveyance (*t*).

It is usual to provide that the purchaser of the largest lot shall take an assignment of the lease, either upon an undertaking to grant sub-terms (less one day) to the other purchasers, or subject to sub-terms previously granted to the other purchasers by the vendor. Such underleases to contain all necessary covenants for indemnifying the grantees of the under-leases against loss or damage for non-performance of

(*r*) *Bliss* v. *Collins* (1822), 5 B. & A. 876.

(*s*) As to apportionment of leaseholds under the Lands Clauses Act, see 8 & 9 Vict. c. 18, s. 119.

(*t*) *Swayne* v. *Commissioners of Inland Revenue*, [1900] 1 Q. B. 172.

covenants or non-payment of rent in respect of any lots other than those sold (*u*). It is a well-known conveyancer's expedient, when the property sold is held with other property under one lease, to carry out the sale by an underlease in order to avoid an apportionment of the rent; it has recently been held that this expedient may be resorted to by trustees exercising the ordinary trust for or power of sale (*x*).

Tithe Rent-charge.—Where the owner of property subject to *one entire* tithe rent-charge is selling the property in lots, it is desirable to insert a condition protecting the vendor from the trouble and expense of an apportionment under s. 72 of the Tithe Act, 1836 (*y*). But where lands charged with one entire rent-charge have become vested in several owners, and one of those owners sells his property, he cannot be required to apportion the rent-charge (under s. 14 of the Tithe Act, 1842 (*z*)) between his property and the other lands subject to it (*a*).

Rent-charges.—Formerly the release of *part* of land subject to an annuity or other rent-charge released the whole of the land charged. This inconvenience was got rid of by s. 10 of Lord St.

(*u*) *Browne* v. *Paull* (1856), 26 L. T. 232.

(*x*) *Re Judd and Poland's and Skelcher's Contract*, [1906] 1 Ch. 684.

(*y*) 6 & 7 Will. 4, c. 71. An apportionment may be made by the Board of Agriculture.

(*z*) 5 & 6 Vict. c. 54.

(*a*) *Re Ebsworth and Tidy's Contract* (1889), 42 Ch. D., at 50.

Leonard's Act (*b*), which enacts that the release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released. If the terre-tenant of the unreleased portion does not concur in the release, he is only liable to a *proportionate* part of the rent-charge in respect of such unreleased land (*c*); but if he concurs, the unreleased portion remains subject to the entire rent-charge (*d*).

Where the owner of the rent-charge has not concurred in an apportionment, an owner of a portion of the land, subject to the rent-charge, can be sued for the whole amount thereof, but has a right of action over against the owners of the other portions (*e*). If, therefore, the owner of the rent-charge is unwilling to release the land sold, some special stipulation as to apportionment should be made. An improvement rent-charge created under the Improvement of Land Act, 1864, may be apportioned by the Board of Agriculture under ss. 68—71 of that statute, and an apportionment of fee-farm rents may be made under the Inclosure Act, 1854 (*f*). As between the owners of the rent-charge, an apportionment may be made

(*b*) Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 10.

(*c*) *Price* v. *John*, [1905] 1 Ch. 744.

(*d*) *Booth* v. *Smith* (1884), 14 Q. B. D. 318.

(*e*) *Christie* v. *Barker* (1884), 53 L. J. Q. B. 537. But a rent-charge is apportionable if it is reserved on a grant of land, and the grantee of the land is evicted from a portion of the land by title paramount. See *Hartley* v. *Maddocks*, [1899], 2 Ch. 199.

(*f*) 17 & 18 Vict. c. 97, ss. 10—14.

without the consent of the terre-tenant so as to keep alive the right of each owner to distrain for his part (*g*).

SECTION 15.

APPORTIONMENT AS BETWEEN VENDOR AND PURCHASER.

Rent.—As already stated, where there is a time fixed for completion, the vendor is entitled to the rents up to that time (*h*). It would seem, however, from modern decisions, and especially from the dicta of COZENS-HARDY, L.J., in two recent cases (*i*), that, in the absence of any express stipulation as to rents, interest or outgoings, the time fixed for completion is not the crucial date, and that the purchaser does not become entitled to the rents and profits, and bound to discharge the outgoings, until he can prudently take possession, that is to say, *from the time when a good title was first shown* (*k*).

The Apportionment Act, 1870 (*l*), provides that after August 1st, 1870, all rents and other periodical payments in the nature of income shall be considered as accruing from day to day, and there seems no reason why this should not include the case of apportionment

(*g*) *Rivis* v. *Watson* (1839), 5 M. & W. 255. As to apportionment of rent-charges under the Copyhold Act, 1894 (57 & 58 Vict. c. 46), see s. 28.

(*h*) Fry, Specific Performance, § 1402.

(*i*) *Barsht* v. *Tagg*, [1900] 1 Ch. 234; *Bennett* v. *Stone*, [1903] 1 Ch. 524.

(*k*) *Re Highett and Bird's Contract*, [1902] 2 Ch. p. 217.

(*l*) 33 & 34 Vict. c. 35.

of rent between vendor and purchaser (*m*), but it is usual and desirable to insert an express stipulation as to apportionment. If the vendor remains in possession after the date fixed by the contract for completion, he cannot as against the purchaser retain out of the rents so received arrears of rent accrued due at the date of the contract, or before the date fixed for completion (*n*).

Outgoings.—The liability to outgoings is coterminous with the right to receive the rents (*o*), and therefore, where a time for completion is fixed, as from which the purchaser is to receive the rents, it is presumed that the vendor is liable to outgoings up to that date only (*p*). Where no time for completion is fixed, then, in the absence of express stipulation, the expenses and outgoings must be borne by the vendor up to the time when the purchaser could prudently have taken possession of the premises sold, *i.e.*, when a good title was first shown (*q*).

Provision for Apportionment.—It is usual, however, to expressly provide in the conditions that, upon completion, all rents, profits, rates, taxes, and outgoings shall be apportioned, if necessary, as from the date fixed for completion. Some taxes, such as property tax, and some rates, such as poor rates, are

(*m*) Dart, Vendors and Purchasers, 7th ed., 824.

(*n*) *Plews* v. *Samuel*, [1904] 1 Ch. 464.

(*o*) Fry, Specific Performance, § 1430.

(*p*) But see dictum of COZENS-HARDY, J., in *Barsht* v. *Tagg*, [1900] 1 Ch. 234, 235.

(*q*) *Carrodus* v. *Sharp* (1855), 20 Beav. 56.

apportionable, and, accordingly, would be apportioned under this clause.

With regard to expenses *incurred before completion* under the Public Health, Metropolis Management, or London Building Acts, if such liabilities are a charge upon the *property*, the vendor is liable, provided that the charge accrues before the date fixed for completion (*r*), or in the case of an open contract, before a good title was first shown (*s*). Under s. 257 of the Public Health Act, and also under the Private Streets Works Act, 1892, the expenses incurred by the local authority become a charge upon the premises so soon as the works have been completed for which such expenses were incurred (*t*).

On the other hand, if such expenses are a charge upon the *owner*, and not upon the *property*, the vendor of freeholds is not liable on an open contract (*u*); but he is liable if he has contracted to discharge all "outgoings" up to the time of completion (*x*). In the case of leaseholds a vendor is bound to perform all the covenants in the lease up to the time for completion, unless the purchaser has notice of a breach of covenant at the date of the contract: therefore, even under an open contract, he must pay the expenses of complying

(*r*) *Re Waterhouse* (1899), 44 Sol. J. 645.

(*s*) *Re Bettesworth and Richer* (1888), 37 Ch. D. 535; *Stock* v. *Meakin*, [1900] 1 Ch. 683.

(*t*) *Re Allen and Driscoll's Contract*, [1904] 2 Ch. 226.

(*u*) *Egg* v. *Blayney* (1888), 21 Q. B. D. 107. It is a doubtful point whether expenses under the London Building Acts are chargeable upon the premises. See *Re Highett and Bird's Contract*, [1903] 1 Ch., at pp. 291, 294.

(*x*) *Midgeley* v. *Coppock* (1879), 4 Ex. D. 309; *Tubbs* v. *Wynne*, [1897] 1 Q. B. 74.

with a dangerous structure notice which would not have been given if he had performed the covenants of the lease. If, however, the purchaser has such notice the vendor is only liable when he has expressly contracted to make a good title (*y*). If the contract gives the vendor an option to receive the rents and profits after the date fixed for completion in lieu of interest, this does not impose on him any obligation to discharge outgoings which become payable between the time fixed for completion and the actual completion of the purchase (*z*).

SECTION 16.

COVENANTS FOR TITLE.

Fiduciary Owners.—In sales by fiduciary vendors and mortgagees, it is not unusual to insert a special condition that the vendors will covenant only that they have not incumbered; although the absence of such a condition would not, it is assumed, render such vendors liable to enter into any other covenants if it is stated in what capacity they sell (*a*).

Beneficial Owners.—It seems doubtful whether an ordinary vendor may not stipulate by the conditions that he shall not enter into covenants for title (*b*). When trustees sell by direction of the tenant for life,

(*y*) *Re Highett and Bird's Contract*, [1902] 2 Ch. 214; [1903] 1 Ch. 287, as explained in *Re Allen and Driscoll's Contract*, [1904] 2 Ch., at p. 321, and *Re Taunton, etc., Society and Roberts' Contract*, [1912] 2 Ch. 381.

(*z*) *Barsht* v. *Tagg*, [1900] 1 Ch. 231.

(*a*) *Cf.* Conveyancing Act, 1881, s. 7 (1) (f).

(*b*) *Re Scott and Alvarez's Contract*, [1895] 1 Ch., at p. 606.

he must enter into the usual covenants for title (*c*), and a condition that trustee vendors shall only covenant against incumbrances does not preclude the purchaser from insisting on a covenant as beneficial owner from a tenant for life whose consent is necessary (*d*).

SECTION 17.

TITLE UNDER INCLOSURES, ETC.

Inclosures and Exchanges.—When the property sold consists of an allotment under an inclosure award, or an allotment taken in exchange (*e*), it is usual to stipulate that the purchaser shall not be entitled to call for the production of the title to the property in respect of which the allotment was made.

Enfranchised Copyholds.—In the case of enfranchised copyholds it was usual to provide that the purchaser should not call for production of the manorial title unless the enfranchisement had been effected under the Copyhold Acts, but now the Conveyancing Act, 1881, s. 3 (2), provides that where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

(*c*) *Earl Poulett* v. *Hood* (1868), L. R. 5 Eq. 115.

(*d*) *Re Sawyer and Baring's Contract* (1884), 53 L. J. Ch. 1104.

(*e*) See General Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 92, 93. The same rule would apply where land is taken by an *order of exchange* under s. 147.

SECTION 18.

FIXTURES, ETC.

Payment for Fixtures.—As we have already seen, there must be an express stipulation as to fixtures if the purchaser is to make any further payment in respect thereof. It is often very difficult to determine what articles are fixtures properly so called, and what are mere movable chattels (*f*), but the question seems seldom to have arisen as between vendor and purchaser. Tapestries have in a number of cases been held to be fixtures; so also have pictures in panels, vases, statues, stone garden seats, and even dog-grates, while, on the other hand, a stuffed bird collection affixed to the walls of a gallery was held to be a movable personal chattel.

SECTION 19.

LEASEHOLDS.

The Lessor's Title.—Formerly, on a sale of leaseholds, if it was desired to negative the purchaser's right to call for the lessor's title, a special stipulation to this effect was inserted in the conditions.

Now, however, as we have seen, the Vendor and Purchaser Act, 1874 (*g*), provides that, under a contract to assign a term of years, the purchaser is not entitled to call for the title to the *freehold*. This is extended by the Conveyancing Act, 1881 (*h*), which

(*f*) Dart, Vendors and Purchasers, 7th ed., 559.

(*g*) 37 & 38 Vict. c. 38, s. 2, r. 1.

(*h*) 44 & 45 Vict. c. 41, s. 3 (1).

enacts that, under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the *leasehold* reversion (*i*).

The effect of these statutes is to preclude the purchaser of a lease or underlease from calling for the lessor's title, unless he expressly stipulates in the contract that he may do so.

Notwithstanding these enactments, the purchaser of a lease or underlease has constructive notice of, and is bound by, restrictive covenants affecting the freehold, or contained in the superior lease (*k*), and a purchaser of an underlease who intends to spend money on the property would be considered guilty of negligence if he did not stipulate by express condition for the right to inspect the head lease (*l*).

Inquiries Aliunde.—It is, therefore, important that a purchaser should make inquiries *aliunde* as to the lessor's title; and it is submitted that if, as the result of his investigations, he discovers that the lessor's title is defective, or that the property is subject to restrictive covenants, he will be entitled to rescind the contract and recover his deposit (*m*).

It is possible, however, for the vendor by an express condition to preclude the purchaser from objecting

(*i*) But he can call for an abstract of the underlease which is being sold to him and of the devolution thereof. See *Gosling* v. *Woolf*, [1893] 1 Q. B. 39.

(*k*) *Patman* v. *Harland* (1881), 17 Ch. D. 353; and *cf.* *Clements* v. *Welles* (1865), L. R. 1 Eq. 200.

(*l*) *Imray* v. *Oakshette*, [1897] 2 Q. B. 218.

(*m*) *Shepherd* v. *Keatley* (1834), 1 C. M. & R. 117.

to defects in the lessor's title which he may have discovered *aliunde* (*n*).

Upon a sale of renewable leaseholds, it may be desirable to negative the right of the purchaser to call for any of the leases prior in date to the subsisting lease (*o*).

Production of Lease.—On a sale by auction of leaseholds, it is usual to state in the particulars and conditions that the lease will be produced at the sale, and that it may be inspected previously, and stipulate that the purchaser shall be deemed to purchase with full notice of its contents, and the condition of the premises as regards repairs and all other matters. If the vendor expressly contracts to make a good title to leaseholds, his obligation is not apparently removed by the knowledge of the purchaser at the time of sale that the title is bad by reason of a breach of the covenant to repair though it is under an open contract (*p*).

Last Receipt for Rent.—The Conveyancing Act, 1881, s. 3 (4), and (5), provides that, on production of a receipt for the last payment of rent due before completion of the purchase, it shall be assumed, *unless the contrary appears*, that all the covenants and provisions under the lease or underlease sold have

(*n*) As to the effect of this, see *ante*, p. 309, and *post*, p. 388.

(*o*) *Hodgkinson* v. *Cooper* (1846), 9 Beav. 304.

(*p*) *Barnett* v. *Wheeler* (1841), 7 M. & W. 364. This is confined to the case of an *express* bargain to make a good title. *Re Allen and Driscoll*, [1904] 2 Ch., at p. 231; *Re Taunton, etc., Society and Roberts' Contract*, [1912] 2 Ch., at p. 385; Williams, Vendor and Purchaser, Vol. I., 354—356.

been observed and performed up to the date of completion of the purchase.

This provision, however, does not apply to the case of a building lease at a peppercorn rent (*q*); and in such a case an express condition should be made that possession by the vendor up to the time of completion shall be conclusive evidence of the performance of the covenants.

The Conveyancing Act only makes the landlord's receipt primâ facie evidence, and it is open to the purchaser to prove that the covenants and conditions in the lease have not in fact been performed and observed up to the time for completion (*r*). Consequently, if there is any question of waiver of breaches of covenant by the lessee, an express condition is desirable, making the last receipt for rent *conclusive* evidence of waiver (*s*); although even in the absence of express condition, a purchaser may be compelled to presume a waiver on sufficient evidence, *e.g.*, where there has been uninterrupted user of the premises as a public-house for upwards of thirty years, with the knowledge of the lessor, in contravention of a covenant in the lease (*t*).

In the case of an ordinary lease, it sometimes happens that the last receipt for rent cannot be found, and in that case a similar stipulation in the conditions of sale will be necessary (*u*).

(*q*) *Re Moody and Yates' Contract* (1885), 30 Ch. D. 344.

(*r*) *Re Highett and Bird's Contract*, [1903] 1 Ch. 287; *Re Taunton, etc., Society and Roberts' Contract*, [1912] 2 Ch. 381.

(*s*) *Cf. Lawrie* v. *Lees* (1880), 14 Ch. D. 249.

(*t*) *Gibson* v. *Doeg* (1857), 2 H. & N. 615; *Re Summerson*, [1900] 1 Ch. 112.

(*u*) *Cf. Ringer* to *Thompson* (1881), 51 L. J. Ch. 42.

On the sale of an underlease, a receipt given to the underlessee by the ground landlord for the ground rent paid by him under threat of distress is not sufficient (*x*).

Where the title to the reversion is in dispute, it is desirable to stipulate that the person giving the last receipt for rent shall be deemed to be the person entitled to the rent reserved by the lease; but it must not be supposed that where a purchaser buys a lease, the vendor is bound to deduce the title of the reversioner for the purpose of showing exactly who is the person entitled to receive the rent (*y*).

SECTION 20.

SALES BY AUCTION.

Parol Variation of Particulars.—In the courts of law evidence of declarations made by auctioneers correcting or explaining the particulars were held to be wholly inadmissible (*z*). This would seem to have been the rule even where it was established that the purchaser heard the statement (*a*). In courts of equity declarations by auctioneers were also held to be inadmissible if offered on behalf of the plaintiff (*b*); but such evidence was admitted if offered by the

(*x*) *Re Higgins and Percival's Contract* (1888), 57 L. J. Ch. 807. But it is submitted that a receipt given by the superior landlord to the undertenant for rent paid by the latter pursuant to s. 6 of the Distress Amendment Act, 1908, would be sufficient.

(*y*) *Pegler* v. *White* (1864), 33 Beav. 406.

(*z*) *Powell* v. *Edmunds* (1810), 12 East, 6.

(*a*) *Jenkinson* v. *Pepys*, cited 6 Ves. 330; 1 V. & B. 528; but see *Gunnis* v. *Erhart* (1789), 1 H. Bl. 289.

(*b*) *Higginson* v. *Clowes* (1808), 15 Ves. 516.

defendant resisting specific performance for the purpose of showing fraud, surprise, or mistake (*c*). If the purchaser has heard and understood a statement by the auctioneer correcting a misdescription in the particulars it is submitted that it would be fraudulent for him to set up this misdescription as a ground for compensation (*d*). But where the purchaser did not hear the statement there can be no question of fraud, nor can the defence of surprise be put forward, since the vendor is author of the particulars.

Unilateral mistake, which is not in any way contributed to by the plaintiff, is not a good defence in equity except in rare cases where hardship amounting to injustice would be inflicted by enforcing specific performance. Consequently a declaration made by the auctioneer can only be admitted where the vendor is defendant, and on the ground of mistake involving hardship. In *Manser* v. *Back* (*e*) the evidence was admitted on this ground, for if specific performance had been decreed in that case, in accordance with the particulars and without the auctioneer's correction, the adjoining property of the vendor would have been rendered inaccessible. This decision was followed by JOYCE, J., in *Re Hare and O'More's Contract* (*f*), although no special case of hardship was made out, and there was an express condition in favour of compensation. It must, therefore,

(*c*) *Clowes* v. *Higginson* (1813), 1 V. & B. 524.

(*d*) *Ogilvie* v. *Foljambe* (1817), 3 Mer. 65; *Re Edwards to Sykes & Co.* (1890), 62 L. T. 447.

(*e*) (1848), 6 Hare, 446.

(*f*) [1901] 1 Ch. 93.

be now taken as decided that a clear and distinct statement by an auctioneer at the time of sale verbally correcting a material misdescription in the particulars disentitles the purchaser to specific performance with compensation even if he does not hear the statement. The proper course when the vendor discovers a mistake in the particulars is to alter them in writing before the sale, or else to issue a *second edition;* but care should be taken that the alterations are brought to the notice of the purchaser before he signs the contract of sale (*g*).

Bidding at an Auction.—On a sale by auction the conditions usually state that the highest bidder shall be the purchaser, and stipulate that not less than a specified sum shall be advanced at each bidding, and that no bidding shall be retracted.

In the absence of a condition against a bidding being retracted, a bidder may, before the fall of the hammer, retract his bidding (*h*), and on principle it seems clear that a purchaser's right in this respect cannot be negatived by such a condition (*i*); but after a lot has been knocked down, neither vendor nor purchaser can revoke the authority conferred by him on the auctioneer (*k*).

(*g*) *Goddard* v. *Jeffreys* (1882), 51 L. J. Ch. 57; *Morton* v. *Noys*, July 13th, 1900: BRUCE, J.

(*h*) *Payne* v. *Cave* (1789), 3 T. R. 148; *Routledge* v. *Grant* (1828), 4 Bing. 653.

(*i*) Pollock, Contracts, 8th ed., 16; Williams, Vendor and Purchaser, Vol. I., 18. See, however, *Freer* v. *Rimner* (1844), 14 Sim. 391.

(*k*) *Day* v. *Wells* (1861), 30 Beav. 220.

Employment of Puffer.—Previous to 1867 (*l*), if property were put up for sale without reserve, the sale was vitiated by a person being employed by the vendor to bid; but in the absence of such a statement the employment of a bidder to prevent the property being sold at an undervalue seemed generally allowable in equity; though Lord CRANWORTH expressed a doubt whether, in the absence of express stipulation, a vendor might employ a bidder.

Sales of Land by Auction Act, 1867.—The law as to the right of the vendor to employ a puffer at an auction is now regulated by the Sales by Auction Act (*l*). This statute enacts that the particulars or conditions of sale shall state whether the land is sold without reserve, or subject to a reserve price, and whether a right to bid is reserved. If the right to bid is expressly reserved the vendor may bid himself or employ a puffer (*m*). On the other hand, if the land is sold "without reserve," the employment of a puffer is illegal (*n*), and even if the conditions state that the sale is subject to a reserved bidding the right to employ a puffer to bid up to the reserve price must be expressly stipulated for (*o*).

An auctioneer has an implied authority to sell without reserve, and if he does so the vendor cannot set up as against the purchaser a limitation of that authority not known to the latter (*p*).

(*l*) 30 & 31 Vict. c. 48.

(*m*) *Ibid.*, s. 6.

(*n*) *Ibid.*, c. 48, s. 5.

(*o*) *Gilliat* v. *Gilliat* (1869), L. R. 9 Eq. 60.

(*p*) *Rainbow* v. *Howkins*, [1904] 2 K. B. 322.

SECTION 21.

SALES BY AUCTION IN BUILDING PLOTS.

Effect of Building Scheme.—Where the vendor is about to sell an estate by auction in building plots, very great care is necessary in framing the conditions of sale, since, in this case, they may amount to an invitation to the public to come in and purchase on the footing that the whole of the property is to be bound by *one general law*.

Thus, if the conditions prescribe that the purchasers shall bind themselves by certain restrictive covenants each purchaser may enforce the performance of these covenants both as against the vendor and against all the other purchasers from him of the property shown as lotted in the plan (*q*).

But the court will not imply a general building scheme unless the persons and plots of land which are to be bound are in some way defined (*r*). A purchaser can enforce the stipulations of a general building scheme even although his conveyance contains a slight departure therefrom (*s*).

It is therefore desirable that the vendor should reserve, by express condition, the power to make

(*q*) *Mackenzie* v. *Childers* (1889) 43 Ch. D. 265; *Tucker* v. *Vowles*, [1893] 1 Ch. 195; *Re Birmingham and District Land Co. and Allday*, [1893] 1 Ch. 342; *Elliston* v. *Reacher*, [1908] 2 Ch. 374, 665; *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305. But *cf.* the case of a sale by a municipal corporation: *Davis* v. *Corporation of Leicester*, [1894] 2 Ch. 208.

(*r*) *Osborne* v. *Bradley*, [1903] 2 Ch. 446.

(*s*) *Rowell* v. *Satchell*, [1903] 2 Ch. 212.

future sales discharged from restrictive conditions (*t*).

SECTION 22.

BENEFICIAL OCCUPATION BY PURCHASER BEFORE COMPLETION.

Position of Purchaser in Occupation.—In the absence of express stipulation the purchaser is not entitled to actual possession until the whole contract is completed, even although the date fixed for completion has passed (*u*). Should the purchaser be let into possession of the property before completion of the purchase, or be in the occupation thereof at the time of the contract being entered into, the position of the vendor and purchaser, as regards payment of rent or compensation for use and occupation should be defined.

In the absence of express stipulation the purchaser is the tenant at will of the vendor, but cannot be ejected without proper notice (*x*). If a purchaser in possession refuses to complete, or fails to comply with the conditions under which possession was given to him, the vendor can compel him to elect either to pay the purchase-money into court, or give up possession of the premises (*y*). If, however, the purchaser has

(*t*) An example of this is to be found in the case of *Sidney* v. *Clarkson* (1865), 35 Beav. 118. See also *Tyndall* v. *Castle*, [1893] W. N. 40; *Att.-Gen., etc.* v. *Richmond Corporation, etc.*, (1903), 89 L. T. 700; *Whitehouse* v. *Hugh*, [1906] 2 Ch. 283.

(*u*) *Phillips* v. *Silvester* (1872), L. R. 8 Ch., at p. 178.

(*x*) Dart, Vendors and Purchasers, 7th ed., 1001.

(*y*) *Tindal* v. *Cobham* (1835), 2 My. & K. 385; *Clarke* v. *Wilson* (1808), 15 Ves. 317; and *cf. Cook* v. *Andrews*, [1897] 1 Ch. 266.

committed *acts of ownership* tending to alter the nature of the premises, no option is given him, and he can be compelled to pay the purchase-money into court (*z*); but acts done in the common course of cultivation or necessary repairs do not come within this principle (*a*). Again, the purchaser has no option if he has allowed the property to deteriorate by the acts of strangers (*b*).

In the absence of stipulation to the contrary, the beneficial occupation by the purchaser of the property agreed to be sold, will not render him liable for use and occupation pending completion, if the contract is not completed by reason of the title being defective (*c*), though a purchaser in such an event has been held to be entitled to recover compensation for use and occupation from a tenant whom he let into possession (*d*).

A tenancy at will is determined by a contract for sale from the time at which possession is agreed to be given to the purchaser (*e*). A tenancy from year to year, or for a longer period, was not determined at law by a contract with the tenant for sale to him unless such contract was absolute for purchase, whether the vendor had a good title or not (*f*),

(*z*) *Lewis* v. *James* (1886), 32 Ch. D. 326; *Greenwood* v. *Turner*, [1891] 2 Ch. 144.

(*a*) *Cf. Cutler* v. *Simons* (1816), 2 Mer. 103.

(*b*) *Pope* v. *Great Eastern Rail. Co.* (1866), L. R. 3 Eq. 171.

(*c*) *Winterbottom* v. *Ingham* (1845), 7 Q. B. 611.

(*d*) *Doe* v. *Mills* (1834), 4 Nev. & M. 25.

(*e*) Sugden, Vendors and Purchasers, 178.

(*f*) *Doe* v. *Stanion* (1836), 1 Mees. & W. 695; *Tarte* v. *Darby* (1846), 15 Mees. & W. 601.

but in equity the landlord cannot call for rent, for the purchaser may "claim under the agreement as determining the relation of landlord and tenant" (g).

(g) *Daniels* v. *Davison* (1809), 16 Ves., at p. 253; and *cf.* *Raffety* v. *Schofield*, [1897] 1 Ch., at p. 942; *Ellis* v. *Wright* (1897), 76 L. T., at p. 525.

CHAPTER XIII.

REQUISITIONS ON TITLE.

SECTION 1.

OF REQUISITIONS GENERALLY.

What are Proper Questions.—After perusing the abstract of title and comparing it with the deeds, the purchaser's solicitor will be in a position to prepare his requisitions. The requisitions to be made must necessarily depend on the nature of the title disclosed by the abstract, and in settling them regard must be had to the stipulations contained in the contract. Most of the questions which are likely to arise have already been considered in dealing with Incidents of Title, Evidence of Title, and Conditions of Sale. The purchaser should avoid making frivolous or unnecessary requisitions which might prejudice the court against him (*a*). He should also bear in mind that by pressing a requisition on some conveyancing point, which though technically sound is of no practical importance, he may become liable to pay interest to the vendor, or may induce the vendor to rescind the contract altogether.

It was formerly the custom to ask whether the vendor or his solicitor was aware of any incumbrance, fact, or circumstance affecting the property not

(*a*) See Dart, Vendors and Purchasers, 7th ed., 506.

disclosed by the abstract; but it has been held by the Court of Appeal that a general requisition of this character need not be answered (*b*).

Every question should be specific, but it is generally considered that the vendor is bound to answer *all relevant questions* put to him in respect of the property which he has contracted to sell and the title thereto (*c*).

SECTION 2.

WAIVER OF REQUISITIONS.

By Delay.—We have already considered the effect of delay in sending in requisitions where there is the usual condition as to their delivery (*d*). But the right to make requisitions, and requisitions when made, may be waived, not only by delay, but also by the conduct of the purchaser.

By Conduct.—In considering waiver by conduct it must be borne in mind that there is a broad distinction between cases in which the contract provides that a good title shall be shown, and also provides that possession may be taken by the purchaser before the title is completed, and cases in which the purchaser takes possession without any express stipulation in the contract.

The taking possession of the property by the purchaser has frequently been held to operate as a waiver

(*b*) *Re Ford and Hill* (1879), 10 Ch. D. 365.

(*c*) Dart, Vendors and Purchasers, 7th ed., 163.

(*d*) *Ante*, p. 297 *et seq.*

of objections to the title (*e*); but if taken in accordance with the intention of the parties, as evidenced by the contract, or with the consent of the vendor, it will not have that effect (*f*).

Again, there is a broad distinction between cases in which the requisitions relate to defects which are removable by the vendor (*e.g.*, requisitions as to conveyance) (*g*) and cases in which the defects are irremovable. If the purchaser takes possession with knowledge of an irremovable defect, this will be construed as a waiver (*h*).

Acceptance of the title, as deduced by the abstract, will not operate as a waiver of the purchaser's right to have the abstract verified (*i*); and if a purchaser express his willingness to accept the title upon a specific objection being removed, and to waive other objections raised by him, such waiver will be conditional only on the removal of the particular objection specified (*k*).

A client will not be bound by his counsel's acceptance of a defective title (*l*).

(*e*) *Binks* v. *Lord Rokeby* (1818), 2 Sw. 222; *Fludyer* v. *Cocker* (1806), 12 Ves. 25; *Haydon* v. *Bell* (1838), 1 Beav. 337.

(*f*) *Stevens* v. *Guppy* (1826), 3 Russ. 171; *Burroughs* v. *Oakley* (1819), 3 Sw. 159; *Dixon* v. *Astley* (1816), 1 Mer. 134.

(*g*) See *ante*, p. 292.

(*h*) *Re Gloag and Miller's Contract* (1883), 23 Ch. D. 320.

(*i*) *Southby* v. *Hutt* (1837), 2 My. & C. 217.

(*k*) *Lesturgeon* v. *Martin* (1834), 3 My. & K. 255.

(*l*) *Deverell* v. *Lord Bolton* (1812), 18 Ves. 505.

SECTION 3.

POINTS TO BE REMEMBERED IN DRAFTING REQUISITIONS.

It is of course impossible to enumerate all the points which may arise in drafting requisitions. It is proposed, however, as a convenient reminder, to enumerate certain matters about which it is necessary to requisition in almost every case.

Execution of Deeds.—It should be seen that all the abstracted deeds were properly executed. If executed by attorney, the purchaser should requisition that the power of attorney be abstracted and the original produced. In the case of appointments and assurances to charitable uses, it should be seen that the deed is duly attested (*m*). In the case of deeds executed by a company, it is usual to require that the articles of association be produced in order to show that the formalities prescribed for the use of the common seal have been complied with.

Identity of Parcels.—It should be seen that the parcels are properly identified. This is particularly important in the case of leaseholds, since when a building speculator takes leases of various plots of land on the same day, it is by no means uncommon for the title to the different plots to become confused in subsequent dealings.

Right to Production.—It should be seen that the abstract discloses proper acknowledgments of right

(*m*) As to what deeds require attestation, see *ante*, p. 258.

to production of all deeds not in the custody of the vendor.

Indorsed Receipts.—In the case of deeds executed before the commencement of the Conveyancing Act, 1881 (*i.e.*, January 1st, 1882), it should be seen that there is a receipt for payment of the consideration indorsed on every deed given for valuable consideration.

Death Duties.—It should be considered whether any occasion for payment of succession or estate duty is disclosed, and if so, production of the official receipt or certificate should be required.

Acknowledgments.—If a married woman appears in the abstract as a conveying party, it must be considered whether an acknowledgment of the deed under the Fines and Recoveries Act, 1833, was necessary.

Marriage Settlement.—When the vendor is a married woman it is usual to inquire whether any settlement was executed on her marriage (*n*), but such a requisition would not seem to be necessary (*o*).

Stamps.—It must be ascertained that all the abstracted documents were properly stamped.

Mortgages.—If there are any subsisting mortgages disclosed, a requisition should be made that the mortgagees either join in the conveyance, or reconvey

(*n*) Dart, Vendors and Purchasers, 7th ed., 367.

(*o*) *Lloyd's Bank* v. *Jones* (1885), 29 Ch. D., at p. 230.

before completion. If the purchaser is buying subject to the mortgages, it should be ascertained what interest is now due.

Joint Account.—If one of several mortgagees appears to have died, it should be seen that the abstracted mortgage deed contained a joint account clause.

Receipt for Rents.—If the property is leasehold, the purchaser should require the last receipt for payment of rent to be produced (*p*).

Evidence.—Proper evidence should be required of all births, deaths, and marriages, and all other relevant facts appearing in the abstract.

Roads.—If the property fronts, adjoins, or abuts on a street (*q*), the purchaser should inquire whether the street has been made up and taken over by the local authority, and whether all sums payable in respect thereof have been duly satisfied.

Means of Access.—If the means of access to the property sold is not apparent (*r*), the purchaser should make inquiry into the matter. Although if the vendor represents, by plan or otherwise, that the property abuts on an existing road, he will be estopped from

(*p*) See *ante*, p. 340.

(*q*) As to the meaning of "Street," see *Jowett* v. *Local Board of Idle* (1888), 36 W. R. 139, 530; *Fenwick* v. *Rural Sanitary Authority of Croydon*, [1891] 2 Q. B. 216, and see *ante*, p. 335.

(*r*) *Denne* v. *Light* (1857), 8 De G. M. & G. 774; *King* v. *Stacey* (1892), 8 T. L. R. 396.

afterwards converting the adjoining land to any other purpose (*s*), the exhibition on the plan of a *proposed* or *intended* road probably creates no estoppel, for estoppel by representation or by deed is applicable only to a state of facts alleged at the time to be actually in existence. It may, however, amount to an implied grant of a right of way (*t*), or be evidence of a general building scheme (*u*).

If the vendor has merely a *way of necessity* over the surrounding lands, the purchaser must ascertain when this way of necessity first arose, since the extent of the right of way is limited by the necessity which created it (*x*). If the way of necessity is over other lands belonging to the vendor, the vendor is entitled to point out which of two or more means of access shall be granted to the purchaser, subject only to this, that it is a convenient way (*y*).

Rights of Light.—If the property purchased consists of a house in a town, it is desirable to ascertain that there is a right to sufficient light. A right to light may be acquired by prescription (*z*), implied (*a*) or express grant, or by express reservation. The fact that the house contracted to be sold has windows looking over the land of a third party implies no

(*s*) *Espley* v. *Wilkes* (1872), L. R. 7 Ex. 298.

(*t*) *Harding* v. *Wilson* (1823), 2 B. & C. 96; *Grogarty* v. *Hoskin*, [1906] 1 I. R. 173.

(*u*) See *Whitehouse* v. *Hugh*, [1906] 2 Ch. 283, where the vendor reserved a right of varying the scheme.

(*x*) *Corporation of London* v. *Riggs* (1880), 13 Ch. D. 798.

(*y*) *Bolton* v. *Bolton* (1879), 11 Ch. D. 968.

(*z*) *Ante*, Chap. X., Sect. 7.

(*a*) *Quicke* v. *Chapman*, [1903] 1 Ch. 659.

representation or warranty that the windows are entitled to access of light, or even that the prescriptive period is running (*b*). But an agreement entered into by the vendor with an adjoining owner not to do anything which will interfere with or prejudicially affect the windows of the adjoining house is a restrictive stipulation which if not disclosed before the contract was entered into is a valid objection to title (*c*).

Enfranchised Copyholds.—The following points should be considered by a purchaser who is buying enfranchised copyholds:

A. Was the enfranchisement in consideration of a rent-charge issuing out of the enfranchised land? (*d*).

B. In the case of a voluntary enfranchisement under the Copyhold Act, 1894, for a *gross sum*, the purchaser should see that this sum has been duly discharged. Until the consideration money has been paid, it is a first charge on the land, and the lord can distrain for it (*e*). In the case of a compulsory enfranchisement, the award is not made until the receipt of the person entitled to receive the compensation has been produced to the board (*f*).

(*b*) *Greenhalgh* v. *Brindley*, [1901] 2 Ch. 324.

(*c*) *Pemsel* v. *Tucker*, [1907] 2 Ch. 191.

(*d*) See the Copyhold Act, 1894 (57 & 58 Vict. c. 46), ss. 8, 15 (b), 17.

(*e*) *Ibid.*, s. 19.

(*f*) *Ibid.*, s. 10 (4).

C. Are the mineral and mining rights still vested in the lord of the manor? The lord's rights in this respect are not affected by an enfranchisement under the Copyhold Act without his express consent in writing (*g*).

Tenancies.—The purchaser should inquire what tenancies now affect the premises. If the terms are in writing, an abstract must be furnished and the counterpart of the lease or agreement handed over on completion. If the terms of any tenancy are not in writing, particulars must be furnished.

Land Tax and Tithe.—The purchaser should inquire whether there is any land tax or tithe rent-charge affecting the premises, and if so what is the amount, and whether there has been any apportionment.

Easements.—It should be asked whether there are any rights of way or other easements affecting the premises. It is submitted that it is the duty of the vendor to answer this question even where the property is sold subject to all easements.

Party Walls.—Inquiry is usually made whether any of the walls or fences are *party* walls or fences.

Notices.—It is important to ascertain whether any

(*g*) See the Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 23; Copyhold Act, 1852, s. 48; *cf. Bellamy* v. *Debenham*, [1891] 1 Ch. 412; *Upperton* v. *Nickolson* (1871), L. R. 6 Ch. 437.

notices have been served on the vendor by any sanitary or local authority, and whether such notices have been duly complied with (*h*).

Insurance.—A requisition is generally made as to whether the premises have been insured, and, if so, in what office, and to what amount; and whether the vendor will hold the policy upon trust for the purchaser, and assign the same upon completion on the usual terms.

Land Duties.—It is usual to inquire whether any provisional or final valuations of the property have been made under the Finance (1909—1910) Act, 1910, and, if so, for particulars to be given, and to require the vendor to have one of the appropriate increment value duty stamps impressed on the assurance to the purchaser before completion (*i*). Also, if the case requires, whether the undeveloped land duty has been assessed and paid, and for particulars of the assessment if any to be furnished.

Registration of Deeds.—If the property is in Middlesex or Yorkshire, the question whether all the abstracted deeds have been duly registered has to be considered, and it should be seen that certificates of registration are indorsed on the deeds.

(*h*) See *Re Leyland and Taylor's Contract*, [1900] 2 Ch. 632, where it is suggested that the omission by the vendor to disclose the fact that notices had been served on him might be ground for refusing specific performance; and see *Carlish* v. *Salt*, [1906] 1 Ch. 335.

(*i*) See Finance (1909—1910) Act, 1910, s. 4 (3).

Registration of Title.—If the property is within the County of London, and the abstract discloses any conveyance on sales since January 1st, 1899, it must be considered whether registration of title was necessary (*k*).

Custody of Deeds.—Lastly, it should be asked which of the abstracted documents will be handed over on completion.

Should the title-deeds, or any of them, not be produced for examination with the abstract, it is most important that the purchaser should make inquiries as to the cause of their non-production; and the purchaser should not be satisfied unless a reasonable excuse for such non-production be given, since omission to make inquiry on the subject may be attributed to wilful blindness (*l*).

The loss of a deed dated subsequently to the commencement of the abstract will not be an objection to the title, provided that it may be fairly assumed that, if produced, it would not throw any difficulty upon the title.

Where the land purchased has a common title with other land and the purchaser is not to have possession of the documents forming the common title, he may, notwithstanding any stipulation to the contrary, require that a memorandum giving notice of any provision contained in the disposition to him restrictive of user of or giving rights over any other land comprised in the common title shall, where practicable,

(*k*) See *post*, Chap. XXI.

(*l*) *Oliver* v. *Hinton*, [1899] 2 Ch. 264.

be indorsed on or, when impracticable, be permanently annexed to some one document selected by the purchaser, but retained in the possession or power of the person who makes the disposition, and being or forming part of the common title (*m*).

(*m*) Conveyancing Act, 1911, s. 11.

PART V.

RIGHTS OF THE CONTRACTING PARTIES AFTER THE CONTRACT AND BEFORE COMPLETION.

CHAPTER XIV.

RELATION OF THE CONTRACTING PARTIES.

SECTION 1.

EFFECT OF CONTRACT.

Vendor is Trustee.—Upon a valid contract for sale and purchase being entered into, the vendor becomes a trustee of the estate sold for the purchaser, and he is bound to take reasonable care that the property is not deteriorated in the interval before completion, and while it is in his possession as a trustee (*a*).

Thus, it is the duty of the vendor to take steps to prevent the land going out of cultivation (*b*), and to protect the property from injury by trespassers (*c*), and he will be liable for breach of trust even after the conveyance. The purchaser is entitled to have

(*a*) See Halsbury, Laws of England, sub-tit. Sale of Land, 364 *et seq.*

(*b*) *Earl of Egmont* v. *Smith* (1877), 6 Ch. D. 469; *Philips* v. *Silvester* (1872), L. R. 8 Ch. 173.

(*c*) *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456.

the property preserved pending completion *in its existing state*, and the vendor would not only not be entitled as against the purchaser's desire to determine an existing tenancy, but if he did determine it, he would be liable to the purchaser for any loss thereby occurring (*d*). Inasmuch, however, as he is only a trustee in respect of the property contracted to be sold, he is not a trustee of the purchaser of rents and profits accruing *before the time fixed for completion*, and he is entitled up to that date to the annual income or fruit of the estate, including royalties paid in respect of an *open* mine or quarry (*e*), and including the crops and other produce of the soil taken in due course of husbandry. On the other hand, where the vendor remains in possession and receives rents after the date fixed for completion, having regard to his position as trustee, he is not entitled as against the purchaser to retain out of the rents so received arrears accrued due before the date fixed for completion (*f*).

Moreover, until the whole of the purchase money has been paid, the vendor is not a mere trustee having no beneficial interest in the property, but his position is something between that of a trustee and a mortgagee (*g*). Until payment of the purchase money, the relation of trustee and *cestui que trust* is not absolutely and completely constituted; it is

(*d*) *Raffety* v. *Schofield*, [1897] 1 Ch. 937.

(*e*) *Leppington* v. *Freeman* (1892), 40 W. R. 348. If the quarry is in hand, the vendor is entitled to the profits of working.

(*f*) *Plews* v. *Samuel*, [1904] 1 Ch. 464.

(*g*) *Lysaght* v. *Edwards* (1876), 2 Ch. D. 506; *Shaw* v. *Foster* (1872), L. R. 5 H. L. 321, at p. 338.

conditional and *sub modo*. Thus the vendor has a lien on the property for the unpaid purchase money, which he retains even after the delivery of possession to the purchaser, and which, after a judicial decree, he may enforce by sale (*h*).

It is clear that a purchaser cannot before completion eject a tenant of the property without making the vendor who has the legal estate a party to the action, unless the tenant has attorned to the purchaser (*i*). Nor can the purchaser before completion enforce equitable rights against third parties (*k*).

Liability of Vendor for Rent.—After the date fixed for completion (or in the case of an open contract, after the time when a good title was first shown), the purchaser is entitled to all the rents and profits of the property, and if the vendor continues to receive them, he must account for them to the purchaser (*l*). Where the vendor remains in actual possession of the premises, he is liable to an occupation rent, which, in the absence of express agreement (*m*), will be assessed by the Court. But, in the case of the sale of trade premises, if, owing to the default of the purchaser, the vendor continues to carry on his business on the premises until the

(*h*) *Mackreth* v. *Symmons* (1808), Wh. & Tu. L. C. Eq., 8th ed., Vol. II., 946, and notes thereto. As to lien of the vendor when the purchase-money is to be paid *by instalments*, see *Nives* v. *Nives* (1880), 15 Ch. D. 649; and as to lien of the purchaser in such a case, see *Cornwall* v. *Henson*, [1899] 2 Ch. 714.

(*i*) *Allen* v. *Woods* (1893), 68 L. T. 144.

(*k*) *De Hoghton* v. *Money* (1866), L. R. 2 Ch. 164.

(*l*) *Sherwin* v. *Shakespear* (1854), 5 De G. M. & G. 517; *Plews* v. *Samuel*, [1904] 1 Ch. 464.

(*m*) *Metropolitan Rail. Co.* v. *Defries* (1877), 2 Q. B. D. 189.

purchase money is paid he will not be liable to occupation rent. In such a case the inconvenience suffered by the vendor is so great that the ordinary rule does not apply (*n*).

If the purchaser is to be let into possession *before* completion, this should be provided for by the conditions, as, in the absence of express agreement, he is not liable for rent (*o*).

Property belongs to Purchaser.—A purchaser who has performed his contract up to the time of the event happening, is entitled to the benefit of any improvements to the property or beneficial circumstance which may arise after the date of the contract and before the conveyance to him (*p*), even though such benefits may have arisen through the expenditure of the vendor (*q*). On the other hand, if the vendor has performed his contract up to the time of the happening of the event, any loss or deterioration of the property after the date of the contract and before the conveyance, which is not attributable to the negligence of the vendor, will fall upon the purchaser (*r*), such, for instance, as the destruction of buildings by fire. In the case of the sale of *leaseholds*, however, it is the duty of the vendor to perform all the covenants in the lease at his own expense (including the covenant to insure) up to the

(*n*) *Leggott* v. *Metropolitan Rail. Co.* (1870), L. R. 5 Ch. 716.

(*o*) Dart, Vendors and Purchasers, 7th ed., 999, *ante*, p. 348.

(*p*) *Harford* v. *Purrier* (1816), 1 Madd. 539.

(*q*) *Monro* v. *Taylor* (1848), 8 Hare, 60.

(*r*) *Paine* v. *Meller* (1801), 6 Ves. 349.

date fixed for completion (*s*), or in the case of an open contract up to the date when a good title was first shown (*t*). After the date fixed for completion, the expense of performing the covenants falls on the purchaser, unless the delay is due to the conduct of the vendor; but it is "the duty of the vendor so to act that nothing done by him prior to the completion of the contract shall constitute a forfeiture of the lease" (*u*), and if the vendor on completion assigns as beneficial owner, he impliedly covenants that all the covenants have been performed up to the time of conveyance (*x*).

Right to Fire Insurance Policy.—Where the property has been insured against fire by the vendor, there is simply a contract to indemnify him by the insurance company, which does not form part of the property contracted to be sold. Consequently, in the event of the premises being damaged or destroyed by fire during the interval before completion, although the vendor (at any rate before he has been paid his purchase money) can sue the insurance office and recover the policy moneys (*y*), the purchaser cannot, in the absence of express stipulation, claim any interest in the policy moneys or set them off against the purchase price (*z*).

(*s*) *Dowson* v. *Solomon* (1859), 1 Drew. & Sm. 1.

(*t*) *Re Highett and Bird's Contract*, [1902] 2 Ch. 214.

(*u*) *Palmer* v. *Goren* (1856), 25 L. J. Ch. 841.

(*x*) Conveyancing Act, 1881, s. 7 (1) (b).

(*y*) *Collingridge* v. *Royal Exchange Assurance Corporation* (1877), 3 Q. B. D. 173.

(*z*) *Rayner* v. *Preston* (1881), 18 Ch. D. 1.

On the other hand, if the vendor receives the insurance money from the company, and also the full amount of the purchase money from the purchaser, the insurance company, on the principle of subrogation, can recover from the vendor out of the purchase money a sum equal to the insurance money (*a*), and they would probably have the right, even though the vendor had agreed by the conditions of sale to give the purchaser the benefit of the insurance. A policy of fire insurance, unlike a marine policy, is not assignable *as of right* (*b*), and the assignee cannot sue on the policy unless the company has declared its assent to the assignment by a memorandum indorsed on the policy. If the fire occurs *after* the purchase has been completed and the purchase money paid, neither vendor nor purchaser can sue the company on the policy unless a proper assignment thereof has been made (*c*).

It is submitted that the proper remedy of the purchaser is to require the company to apply the insurance money in reinstating the premises. This the purchaser has power to do under s. 83 of the Fires Prevention (Metropolis) Act, 1774 (*d*), since it seems clear that he is a "person interested" within

(*a*) *Castellain* v. *Preston* (1883), 11 Q. B. D. 380.

(*b*) *Sadlers' Co.* v. *Badcock* (1743), 2 Atk. 554.

(*c*) *Ecclesiastical Commissioners* v. *Royal Exchange Assurance Corporation* (1895), 39 Sol. J. 624.

(*d*) 14 Geo. 3, c. 78. Lord WESTBURY held that the Act was of universal application (*Ex parte Gorely* (1864), 4 De G. J. & S. 477), and though this was doubted by Lord WATSON in *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas., at p. 716, it was followed by SWINFEN-EADY, J., in *Re Quickes Trusts*, [1908] 1 Ch., at p. 893, and by PARKER, J., in *Sinnott* v. *Bowden*, [1912] 2 Ch. 414.

the meaning of that statute (e). He must, of course, make this request before the company have settled with the vendor (f).

In order to avoid litigation, however, it is desirable that the purchaser, immediately upon entering into the contract, and thereby obtaining an insurable interest, should himself effect an insurance (g).

SECTION 2.

LUNACY OF THE PARTIES AFTER CONTRACT.

Effect of Lunacy.—The fact that one of the contracting parties becomes a lunatic during the interval before completion does not avoid the contract, for if there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit (h). If the vendor becomes a lunatic after the whole of the purchase money has been paid (i), or after the contract has been so acted upon that a decree for specific performance would be a matter of course (k), the purchaser should apply for a vesting order under s. 135 of the Lunacy Act, 1890,

(e) It has been held that the Act applies not only as between landlord and tenant, but also as between mortgagor and mortgagee. *Sinnot* v. *Bowden*, *supra*, differing from *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1888), 13 App. Cas., at p. 714.

(f) *Simpson* v. *Scottish Union Insurance Co.* (1863), 1 H. & M. 618.

(g) A "cover note" is now issued by some insurance companies. See 46 Sol. J. 150.

(h) *Owen* v. *Davies* (1748), 1 Ves. 82.

(i) *Re Cuming* (1869), L. R. 5 Ch. 72.

(k) *Re Pagani*, [1892] 1 Ch. 236; *Re Bradley's Settled Estate* 1885), 54 L. T. 43.

and the Lunacy Act, 1911 (*l*). But where the contract is purely executory, the court will not make a vesting order until the right to specific performance has been settled by a decree (*m*). In such cases the purchaser must proceed by an action for specific performance in the Chancery Division, and obtain a declaration that the lunatic is a trustee for him of the property (*n*).

The High Court has jurisdiction under the Trustee Act, 1893 (*o*), to appoint a new trustee in the place of a sole surviving trustee who is a lunatic, not so found by inquisition, and to make a vesting order consequential thereon (*p*).

It must, however, be remembered that the committee of the lunatic's estate has to obtain the sanction of the Court of Lunacy before defending the action (*q*). If the purchaser obtains a decree, it is clearly the duty of the committee or guardian *ad litem* (*r*), to apply to the Court of Lunacy, by summons, for a direction to execute the conveyance to the purchaser (*s*).

By s. 120 of the Lunacy Act the judge in lunacy

(*l*) See R. S. C., Order LV. r. 13 B.

(*m*) *Re Carpenter* (1854), Kay, 418; *Re Colling* (1886), 32 Ch. D. 333.

(*n*) *Cowper* v. *Harmer* (1887), 57 L. J. Ch. 460.

(*o*) 56 & 57 Vict. c. 53, s. 25.

(*p*) Lunacy Act, 1911, s. 1; and see R. S. C, Order LV. r. 13 B. Until this Act was passed, it was necessary to apply in lunacy for a vesting order. See *Re M.*, [1899] 1 Ch. 79.

(*q*) *Re Manson* (1852), 21 L. J. Ch. 249.

(*r*) See R. S. C., Order XVI. r. 17; Order XIII. r. 1; and Order IX. r. 5; *cf.* also Lunacy Act, 1890, s. 116.

(*s*) *Cf. Baldwyn* v. *Smith*, [1900] 1 Ch. 588.

may direct the committee to "perform any contract relating to the property of the lunatic entered into by the lunatic before his lunacy"; and s. 124 enacts that the committee shall, in the name of, or on behalf of, the lunatic, execute all such assurances for giving effect to any order under this Act as the judge directs, and every such assurance shall be valid and effectual, and shall take effect accordingly.

SECTION 3.

BANKRUPTCY OF PARTIES AFTER CONTRACT.

Effect of Bankruptcy.—The bankruptcy of either the vendor or the purchaser will not avoid the contract (*t*), provided that the contract was entered into before a receiving order was made, and that the other party had no notice of an available act of bankruptcy (*u*).

Bankruptcy of Purchaser.—With regard to the bankruptcy of the purchaser, it is clear that the trustee may elect to fulfil the contract and pay the purchase money provided that he does so within a reasonable time (*v*): but specific performance will not be granted against the purchaser's trustee in bankruptcy (*x*). It is, moreover, presumed that the trustee can disclaim the contract and the equitable interest of the bankrupt purchaser in the land under

(*t*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49 (d).
(*u*) But see *post*, p. 383, as to repudiation by the purchaser.
(*v*) *Ex parte Stapleton* (1879), 10 Ch. D., at p. 590.
(*x*) *Holloway* v. *Yorke* (1877), 25 W. R. 627.

the provisions of the Bankruptcy Acts which provide (*y*) that when any part of the property of the bankrupt consists of *unprofitable contracts*, the trustee in bankruptcy, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto, may, by writing signed by him at any time within twelve months after the first appointment of a trustee, disclaim the property. Provided that when any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within twelve months after he first became aware of it (*z*).

The disclaimer operates to determine as from the date of disclaimer the rights and liabilities of the bankrupt and his property in or in respect of the property disclaimed (*a*), and the only remedy of the other contracting party is to prove in the bankruptcy as a creditor for the injury which he has suffered by the disclaimer (*b*).

The other contracting party may, however, make an application in writing to the trustee requiring him to decide whether he will disclaim or not; and if, after the period of twenty-eight days, or such extended period as may be allowed by the court, the trustee

(*y*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (1), as amended by s. 13 of the Act of 1890.

(*z*) The Official Receiver, acting under s. 54 (1), is not subject to this limitation of time for the exercise of the right of disclaimer, since he is never "appointed." *Re Cohen*, [1905] 2 K. B. 704.

(*a*) Bankruptcy Act, 1883, s. 55 (2).

(*b*) *Ibid.*, s. 55 (7).

does not give notice of his intention to disclaim, *he will be deemed to have adopted the contract* (c).

If the trustee disclaims the contract, the vendor is, of course, entitled to retain the deposit even in the absence of an express stipulation as to forfeiture (d).

Bankruptcy of Vendor.—If the property which is the subject of the sale is freehold, it would seem that the trustee in bankruptcy of the vendor cannot disclaim. A contract to sell land is not included in the class of property referred to in s. 55 of the Bankruptcy Act (e). If the property is leasehold the trustee cannot disclaim the contract without also disclaiming the leasehold interest of the vendor (f), and in any case the disclaimer cannot take away the equitable interest in the land which the purchaser has acquired under his contract. The property vests in the trustee subject to the equity of the purchaser, and it therefore follows that the purchaser can enforce specific performance against the trustee in bankruptcy (g). The purchase money must of course be paid to the trustee, and not to the bankrupt (h), and it is doubtful whether, if a purchaser, *after a Receiving Order* of which he has no notice, pays his purchase money to the bankrupt, he is in any way protected (i). It is conceived that

(c) Bankruptcy Act, 1883, s. 55 (4).

(d) *Ex parte Barrell* (1875), L. R. 10 Ch. 512.

(e) *Re Bastable*, [1901] 2 K. B. 518.

(f) *Ibid.*

(g) *Pearce* v. *Bastable's Trustee in Bankruptcy*, [1901] 2 Ch. 122.

(h) *Powell* v. *Marshall & Co.*, [1899] 1 Q. B. 710.

(i) *Ex parte Rabbidge* (1878), 8 Ch. D. 367.

if all the purchase money has been paid before the receiving order and without notice of an act of bankruptcy, the legal estate does not vest in the vendor's trustee in bankruptcy (*k*); but when the trust is constructive and the equity doubtful the court generally directs the trustee to concur in the conveyance.

SECTION 4.

LIQUIDATION OF CONTRACTING COMPANY.

Effect of Winding-up.—The main distinctions between bankruptcy and the winding-up (whether compulsory or voluntary) of a company are as follows:

(1) In bankruptcy the property of the debtor is divested from him and vested in a trustee for his creditors, whilst in a winding-up the property of the company is not divested from it;

(2) The doctrines of relation back and reputed ownership do not apply to a winding-up;

(3) In a winding-up there is no power of disclaimer (*l*).

Although, however, the company's property does not vest in the liquidator and he has no power to disclaim an onerous contract, and although the bankruptcy doctrine of relation back does not strictly apply, yet, in the case of a *compulsory* winding-up, the liquidation is deemed to commence at the time of the presentation of the petition (*m*), and all dispositions of the property

(*k*) See Bankruptcy Act, 1883, s. 44 (1); and *cf.* dictum of ROMER, L.J., [1901] 2 K. B., at p. 529. See also *St. Thomas' Hospital* v. *Richardson*, [1910] 1 K. B. 271.

(*l*) *Fryer* v. *Ewart*, [1902] A. C., at p. 195.

(*m*) Companies (Consolidation) Act, 1908, s. 139.

of the company made after the commencement of the winding-up "shall unless the court otherwise orders be void" (*n*). There is no similar provision in the case of a voluntary winding-up; but upon the appointment of a liquidator in a voluntary winding-up all the powers of the directors cease (*o*).

Vendor Company.—If a petition has been presented against a vendor company the purchaser cannot safely complete his purchase until either the petition has been dismissed or a winding-up order made, since the conveyance by the company would be voidable. If, however, the company has already conveyed the property, the purchaser may, it is conceived, accept the receipt of the company for the balance of the purchase money (*p*). After a winding-up order has been made the purchaser cannot enforce his contract except with the leave of the court (*q*), but it is conceived that leave would be given if the liquidator declined to carry out the sale. If the liquidation is voluntary the purchaser can enforce his rights by an action for specific performance or damages (*r*), but his costs of action, unless it was instituted *before* the commencement of the winding-up, *i.e.*, the time of the passing of the resolution authorising such winding-up (*s*), must be proved for in the liquidation (*t*).

(*n*) Companies (Consolidation) Act, 1908, s. 205 (2).
(*o*) *Ibid.*, s. 186 (iii).
(*p*) Palmer, Winding-Up, 400.
(*q*) Companies (Consolidation) Act, 1908, s. 142.
(*r*) *Currie* v. *Consolidated Kent Collieries*, [1906] 1 K. B. 134.
(*s*) Companies (Consolidation) Act, 1908, s. 183.
(*t*) *Wenborn & Co.*, [1905] 1 Ch. 413.

If, after receiving the purchase money, the vendor company is dissolved under s. 195 of the Companies (Consolidation) Act, 1908, before a conveyance has been executed, the purchaser can obtain a vesting order under the Trustee Act, 1893 (*u*).

Purchasing Company.—It is clear that after a petition has been presented against a purchasing company, a vendor cannot safely complete since the payment of the purchase money would be voidable. After the winding-up order has been made, although the liquidator cannot disclaim, it is presumed that a specific performance action by the vendor would be stayed, and that his remedy if the liquidator refuses to complete, is to forfeit the deposit and prove for damages in the winding-up (*x*). But an unpaid vendor who has conveyed the property can obtain leave to enforce his lien (*y*).

SECTION 5.

DEATH OF PARTIES AFTER CONTRACT.

Death of Vendor.—If the vendor dies before completion, and there is a binding contract (*z*), the purchase money forms part of his personal estate, and his legal personal representatives can give a valid discharge for it (*a*). In the case of freehold

(*u*) *Re Bomore Road*, [1906] 1 Ch. 359.

(*x*) See, however, *Thames Plate Glass Co.* v. *Land and Sea Telegraph Construction Co.* (1871), L. R. 6 Ch. 643.

(*y*) *Lloyd* v. *David Lloyd & Co.* (1877), 6 Ch. D. 339.

(*z*) *Re Thomas* (1886), 34 Ch. D. 166.

(*a*) *Fletcher* v. *Ashburner* (1779), 1 Wh. & Tu. L. C. Eq., 8th ed., 347, and notes thereto.

land the legal estate now devolves on them either under s. 30 of the Conveyancing Act, 1881, or Part I. of the Land Transfer Act, 1897, notwithstanding any testamentary disposition, and they are therefore the proper persons to execute the conveyance (*b*).

If the land contracted to be sold is *copyhold*, however, the above statutes do not generally apply (*c*), and the legal estate will pass to a devisee under the vendor's will (*d*), or in the absence of such a devise will descend to the vendor's customary heir, and if the customary heir is an infant, the purchaser must apply to the court for a vesting order (*e*).

Vendor a Tenant for Life.—If the vendor was tenant for life, and entered into the contract in pursuance of a power in the settlement, the contract can be enforced by or against the remaindermen (*f*) or the trustees of the settlement (*g*). So, too, if the vendor contracted as tenant for life under the Settled Land Acts, the contract is enforceable *against* and *by* every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor (*h*).

(*b*) See *ante*, pp. 85–88.

(*c*) See Copyhold Act, 1894, s. 88; Land Transfer Act, 1897, s. 1 (4).

(*d*) See *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499.

(*e*) *Re Beaufort's Will*, [1898] W. N. 148. An equitable estate, however, devolves on the legal personal representatives under the Land Transfer Act. *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583. See *ante*, p. 86.

(*f*) *Shannon* v. *Bradstreet* (1802), 1 Sch. & Lef. 52.

(*g*) *Davis* v. *Harford* (1882), 22 Ch. D. 128.

(*h*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 31 (2); Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 6.

Death of Purchaser.—On the death of the purchaser before completion, his heir or devisee is equitably entitled to the property which is the subject of the contract, provided that the contract is a binding one (*i*); and he can enforce specific performance against the vendor.

A general or residuary devise contained in a will made since the passing of the Wills Act, 1837, will pass land contracted to be purchased by the testator after the date of the will (*j*).

Real Estates Charges Acts.—Formerly, the heir or devisee was entitled to have the purchase money discharged out of the purchaser's personal estate (*k*); but now since the Locke-King's Act Amendment Acts of 1867 (*l*) and 1877 (*m*), the unpaid purchase money must be deemed to be a sum charged on the land by way of mortgage within the meaning of the principal Act (*n*); and these enactments apply to the sale of leaseholds as well as of freeholds and copyholds (*o*).

The purchase money, which, in the eyes of equity, is converted into realty by the contract of sale, is reconverted into personalty by the statute. The result, therefore, is that the heir or devisee of the purchaser is entitled to the land charged with the unpaid purchase money; if he seeks to enforce specific

(*i*) *Buckmaster* v. *Harrop* (1802), 7 Ves. 341.

(*j*) 1 Vict. c. 26, s. 24; but as to "contrary intention," see *ante*, p. 169.

(*k*) *Holt* v. *Holt* (1670), 2 Vern. 322.

(*l*) Real Estate Charges Act, 1867, 30 & 31 Vict. c. 69.

(*m*) Real Estate Charges Act, 1877, 40 & 41 Vict. c. 34.

(*n*) Real Estate Charges Act, 1854, 17 & 18 Vict. c. 113.

(*o*) *Re Kershaw* (1888), 37 Ch. D. 674.

performance, he must pay the purchase money out of his own pocket (*p*); and if he agrees with the vendor to rescind the contract, he is entitled to nothing (*q*). It must, however, be remembered that the Locke-King's Acts do not apply in the case of the devisee of a purchaser where there is evidence of a contrary intention on the part of a testator (*r*), nor in any case where the vendor has no *lien* for unpaid purchase money (*s*).

Where the vendor sought to enforce specific performance after the death of the purchaser, it was the practice, prior to 1877, to make both the real and personal representatives of the purchaser defendants to the action (*t*). It is submitted that this is still the correct procedure, even where the contract is under seal (*u*), since it is clear that the devisee may disclaim the devise (*x*), and that the heir cannot be liable to pay the purchase money where he has no assets by descent (*y*). In any case it is desirable to make a distinct alternative claim against the personal representatives for damages for breach of contract. If the

(*p*) *Re Kidd*, [1894] 3 Ch. 558.

(*q*) *Re Cockcroft* (1883), 24 Ch. D. 94.

(*r*) As to evidence of contrary intention, see *Re Fleck* (1888), 37 Ch. D. 677; *Re Campbell*, [1893] 2 Ch. 206.

(*s*) *Re Cockcroft* (1883), 24 Ch. D. at p. 100.

(*t*) Fry, Specific Performance, § 217; Dart, Vendors and Purchasers, 6th ed., 1132.

(*u*) *Cf.* Conveyancing Act, 1881, s. 59.

(*x*) *Cf.* RICHARDS, L.C.B., in *Townsend* v. *Champernowne* (1821), 9 Price, 133: "The devisee is not bound to take the estate if *damnosa hæreditas*."

(*y*) The heir can plead *riens per* descent: see 1 Will. 4, c. 47, s. 7.

purchaser dies insolvent, and his estate is administered under s. 125 of the Bankruptcy Act, 1883, the trustee under that section has the same power to disclaim the contract as an ordinary trustee in bankruptcy (*z*).

SECTION 6.

ASSIGNMENT OF THE CONTRACT.

When Contract for Sale of Land Assignable.—The provisions of s. 25 of the Judicature Act with regard to the assignment of contracts do not render contracts assignable which before the Act were incapable of assignment, such as those involving special personal qualifications on the part of the person claiming specific performance. As a general rule personal considerations do not enter into a contract for the sale of land (*a*), and therefore the purchaser can sell the benefit of his contract to a third party, and compel the vendor to convey to his nominee (*b*).

In the case of sales under the Order of the Court, when a certificate of the Master as to the result of sale is required, the contract is not complete until eight days after the filing of the Master's certificate, and it seems doubtful whether before the expiration of that period the original purchaser can sub-sell the property (*c*).

(*z*) *Re Mellison*, [1906] 2 K. B. 68.

(*a*) *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223.

(*b*) *Earl of Egmont* v. *Smith* (1877), 6 Ch. D. 474; *Delves* v. *Gray*, [1902] 2 Ch. 611. When there is no increase of price on the sub-sale, the original purchaser should not be made a party to the conveyance: Dart, Vendors and Purchasers, 7th ed., 536.

(*c*) Seton, p. 344.

The contract of sub-sale converts the original purchaser into a trustee of his equitable interest for the sub-purchaser, who acquires the rights which the original purchaser had under the primary contract (*d*). The sub-purchaser, like any other assignee of a chose in action, of course takes subject to all equities subsisting between the vendor and the original purchaser, and the sub-sale does not affect the rights of the vendor. He must take the position of the original purchaser *cum onere* with the obligation of performing the duties which the original purchaser would otherwise have to perform for the fulfilment of the contract. If the sub-purchaser is able and willing to assume the position of the original purchaser, he can obtain specific performance against the vendor, but it is usually necessary in such an action to make the original purchaser a party, unless the vendor has expressly or by conduct accepted the sub-purchaser in the place of the original contracting party (*e*).

A sub-purchaser obtains, it is conceived, an equitable interest in the land, and is protected against the equity of a third party to set aside the contract if he has no notice of it (*f*).

If the vendor improperly repudiates the contract a sub-purchaser to whom the benefit of the contract has been assigned by the original purchaser is, it seems, an assignee of a legal chose in action within

(*d*) *Wood* v. *Griffith* (1818), 1 Swans. 43.

(*e*) *Holden* v. *Hayn* (1815), 1 Meri. 47; *Manchester Brewery* v. *Coombs*, [1901] 2 Ch. 616.

(*f*) See *per* JOYCE, J., in *Hurrell* v. *Littlejohn*, [1904] 1 Ch. 692; Dart, Vendors and Purchasers, 7th ed., 751.

s. 25 (6) of the Judicature Act (*g*), and can recover damages from the vendor.

On the other hand, if the sub-purchaser refuses to accept all the obligations of the original purchaser (*h*), or if he does not give notice to the vendor of his intention to perform the contract, the vendor is not debarred from completing the contract with the original purchaser (*i*).

(*g*) *Torkington* v. *Magee*, [1902] 2 K. B. 427.

(*h*) *Crabtree* v. *Poole* (1871), L. R. 12 Eq. 13; *Ridout* v. *Fowler*, [1904] 1 Ch., at p. 663.

(*i*) *Shaw* v. *Foster* (1872), L. R. 5 H. L. 321.

CHAPTER XV.

REPUDIATION BY PURCHASER.

Repudiation before Time fixed for Completion.— It is not absolutely necessary that the title of the vendor should be perfect at the time the contract is entered into, provided he is able to perfect it before completion, and in many cases vendors have succeeded in enforcing specific performance although their title was not perfected until after the date fixed for completion (*a*). Moreover, after a decree for specific performance a defendant purchaser cannot repudiate the contract without the leave of the court (*b*), and such leave will not as a rule be given if the title is capable of being made good within a reasonable time.

Nevertheless, where there has been no decree, the purchaser is not bound to wait until the vendor has acquired a good title; but if he finds that the vendor, when he made the contract, had *no right* to the property, he may repudiate the contract even before the time fixed for completion (*c*). In *Forrer* v.

(*a*) *Hoggart* v. *Scott* (1830), 1 Russ. & M. 293; *Wylson* v. *Dunn* (1887), 34 Ch. D. 569.

(*b*) *Halkett* v. *Dudley*, [1907] 1 Ch. 590.

(*c*) *Brewer* v. *Broadwood* (1882), 22 Ch. D. 105; *Bellamy* v. *Debenham*, [1891] 1 Ch. 412; *Halkett* v. *Dudley*, *supra*, at p. 596. It would appear that this right of repudiation must be distinguished from the common law right of rescission, and arises out of the want of mutuality, which, unless waived, is generally fatal to relief by way of specific performance. It is for this reason that if the purchaser does not repudiate promptly he cannot afterwards exercise the right without giving the vendor a reasonable time to cure the defect. See the judgment of PARKER, J., in the case last cited.

Nash (*d*), Lord ROMILLY states the law on this point as follows: "When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold."

Upon this principle it has been held that where the purchaser discovers that the vendor has committed an act of bankruptcy, he may at once repudiate the contract without waiting to see whether a bankruptcy petition will be presented within three months (*e*), but it is submitted that this decision would not apply if the time fixed for completion is more that three months after the act of bankruptcy (*f*). Again, when the contract is subject to a condition that the vendor shall procure the consent of some third party, there are at least four cases in which the purchaser is not bound to wait until the date fixed for completion, viz.: (1) where the purchaser can show by sufficient evidence that the condition cannot be practically fulfilled by the date fixed; (2) where the vendor has substantially admitted that the condition is incapable of fulfilment; (3) where there is an agreement, express or implied, between vendor and purchaser, that a particular refusal of the third party shall be taken as conclusive;

(*d*) (1865), 35 Beav. 171; *Smith* v. *Butler*, [1900] 1 Q. B., at p. 700; *Re Cooke and Holland's Contract* (1898), 78 L. T. 106.

(*e*) *Powell* v. *Marshall Parkes & Co.*, [1899] 1 Q. B. 710.

(*f*) See Bankruptcy Act, 1883, s. 43.

and (4) where the refusal of the third party is so treated by the vendor as to justify the purchaser in regarding the matter as at an end (g). In every case, however, it is more prudent for the purchaser to wait until the date of completion has passed before repudiating.

When Purchaser cannot repudiate before Time for Completion.—A distinction has been made between the case of a vendor who has no interest whatever in the property, where, as we have seen, the purchaser can repudiate before the time fixed for completion, and the case of a vendor having only a partial interest, who has contracted to sell the fee simple. If a vendor, who, at the time when he sells, has only a partial interest, as, for instance, a tenant for life (h), or a tenant by the curtesy (i), affects to sell the fee simple, the court will enforce specific performance, provided that before the time fixed for completion he can get in the whole fee simple, and so acquire the power of carrying out his contract (k).

On the other hand, a purchaser is not bound to accept a different title to that which he agreed to take. Thus, where a purchaser has contracted to buy property from trustees selling under a power of sale, he cannot be compelled to accept a title from the tenant for life under the Settled Land Acts (l), nor

(g) *Smith* v. *Butler*, [1900] 1 Q. B., at p. 699; *Ellis* v. *Rogers* (1885), 29 Ch. D. 671, 672.

(h) *Salisbury* v. *Hatcher* (1842), 2 Y. & C. C. C. 62.

(i) *Murrell* v. *Goodyear* (1859), 1 De G. F. J. 432.

(k) *Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 221, 223.

(l) *Ibid.*, at p. 218.

from the trustees themselves with the concurrence of all the beneficiaries, if such concurrence is not procured until after the time fixed for completion has expired (*m*). But if the trustee enters into the contract at the request of all the beneficiaries, it seems that the title may be forced on the purchaser (*n*). When at the time fixed for completion the vendor who had contracted to sell a lease could only show a title to an under-lease, and had no power to get in the head-lease, the purchaser was held justified in repudiating the contract (*o*).

When Purchaser cannot repudiate until a Reasonable Time after the Time for Completion.—If the defect discovered by the purchaser is a defect of *conveyance* and not a defect of *title*, the purchaser is not entitled to repudiate at once, even though the time fixed for completion has passed (*p*).

In such a case, the proper course for the purchaser to pursue is to give the vendor a reasonable time to remedy the defect, and to inform the vendor that if the defect is not remedied in reasonable time, he will repudiate the contract (*q*).

Should the abstract not be delivered within the time stipulated for its delivery, or where no time has

(*m*) *Re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310, at p. 317.

(*n*) *Re Baker and Selmon's Contract*, [1907] 1 Ch. 238.

(*o*) *Warren* v. *Moore* (1898), 14 T. L. R. 497; and *cf. Re Halifax Commercial Banking Co., Limited, and Wood* (1898), 79 L. T. 536.

(*p*) *Re Hucklesby and Atkinson's Contract* (1910), 102 L. T. 214.

(*q*) *Hatten* v. *Russell* (1888), 38 Ch. D. 334. As to what are defects of conveyance, see *ante*, p. 292.

been named by the contract, within a reasonable time before the day fixed for completion, if it is the intention of the purchaser to avoid the contract on this ground, the solicitor should object to receive, or at once return it (*r*). The proper course for the purchaser in such a case is to give the vendor notice that if a proper abstract is not delivered within a reasonable period, *e.g.*, fourteen days, he will treat the contract as at an end (*s*).

What amounts to Repudiation.—In the absence of any *express* repudiation by the purchaser, an intention to repudiate may be inferred from his conduct. But mere delay, although sufficient to deprive him of the right to specific performance, will not as a rule be construed as amounting to repudiation, and where part of the purchase money has been paid, the court will be very reluctant to hold that the purchaser has repudiated the contract (*t*).

(*r*) Dart, Vendors and Purchasers, 7th ed., 341.

(*s*) *Compton* v. *Bagley*, [1892] 1 Ch. 313; *Re Hucklesby and Atkinson's Contract* (1910), 102 L. T. 214.

(*t*) *Cornwall* v. *Henson*, [1900] 2 Ch. 298; *Levy* v. *Stogdon*, [1898] 1 Ch. 478.

CHAPTER XVI.

REMEDIES BY WHICH THE CONTRACT CAN BE ENFORCED.

SECTION 1.

DISTINCTION BETWEEN THE DIFFERENT REMEDIES.

Damages and Specific Performance.—Prior to the Judicature Act, there were two remedies open in the case of a breach of contract for the sale of land, viz., an action for damages in the courts of common law or the extraordinary remedy of a suit for specific performance in the Court of Chancery. Lord Cairns's Act (*a*) enabled the Court of Chancery to give damages as a substitute for specific performance. This Act has since been repealed (*b*), but the repeal does not affect the jurisdiction of the court (*c*).

Since the Judicature Act, law and equity are concurrently administered in all the divisions of the High Court, but the nature of these two remedies remains unaltered, and it is important to bear in mind the distinction between them. Thus, there are many cases in which a vendor, who would fail in an action for specific performance, may yet obtain damages for breach of contract; as, for instance, where the purchaser has repudiated the contract, and the vendor

(*a*) 21 & 22 Vict. c. 27.

(*b*) Statute Law Revision Act, 1883.

(*c*) *Sayers* v. *Collyer* (1884), 28 Ch. D. 103.

has sold at a loss to a third party. On the other hand, we have seen that a purchaser who contracts subject to conditions as to title, is bound by those conditions unless they are misleading (*d*). Consequently, even though he discover that the vendor's title is positively bad, he cannot recover his deposit and costs of investigation, either by an action for breach of contract (*e*) or by a summons under s. 9 of the Vendor and Purchaser Act (*f*). But if the vendor seeks to enforce specific performance of the contract, we come to an entirely different region of law, for the remedy of specific performance is subject to the discretion of the court. Where the vendor can give a good holding title, although it may not be a satisfactory title, from the point of view of a strict conveyancer, the court, in the case of contracts subject to stringent conditions as to title, will enforce specific performance (*g*). But if the vendor has only a mere semblance of a title, where in fact the purchaser would not get the land which he has contracted to buy, but would be liable to be immediately ejected, the court has in no recorded instance enforced specific performance (*h*).

The principle is clearly established that the court will not compel the purchaser *to purchase a law suit*. "The Court cannot force on anybody a title which

(*d*) See *ante*, p. 309.

(*e*) *Corrall* v. *Cattell* (1839), 4 M. & W. 734; *Best* v. *Hamand* (1879), 12 Ch. D. 1.

(*f*) *Re National and Provincial Bank and Marsh*, [1895] 1 Ch. 190.

(*g*) *Hume* v. *Bentley* (1852), 5 De G. & Sm. 520; *Duke* v. *Barnett* (1846), 2 Coll. 337; *Saxby* v. *Thomas* (1891), 63 L. T. 695; 64 L. T. 65.

(*h*) *Re Scott and Alvarez's Contract*, [1895] 2 Ch. 603.

it is evident will involve the taker in immediate litigation" (*i*). Upon the same principle it has been held that a purchaser cannot be compelled to accept a title which involves *controverted facts*, estoppel, or acquiescence (*k*), as, for instance, whether a previous purchaser bought without notice of a restrictive covenant (*l*), or whether a lessor is justified in refusing a licence to assign (*m*), or whether the vendor purchased without notice that the lease under which he holds did not comply with the statutory requirements of the Settled Land Acts, (*n*). Nor will a title be forced on a purchaser, at any rate by a court of first instance, if the title depends on a question of law as to which there are conflicting dicta by eminent judges (*o*).

If the vendor elects to bring an action for specific performance, he cannot, at the trial, amend his pleadings so as to change the whole nature of his action, and turn it into an ordinary action for damages at common law (*p*). It is presumed, however, that a claim may be framed in such a way as to make a distinct alternative claim for damages for breach of

(*i*) *Pegler* v. *White* (1864), 33 Beav. 408.

(*k*) *Re New Land Development Association and Gray*, [1892] 2 Ch. 148.

(*l*) *Nottingham Patent Brick and Tile Co.* v. *Butler* (1886), 16 Q. B. D., at p. 787.

(*m*) *Re Marshall and Salt's Contract*, [1900] 2 Ch. 202; but *cf. White* v. *Hay* (1895), 72 L. T. 281.

(*n*) *Re Handman and Wilcox's Contract*, [1902] 1 Ch. 599.

(*o*) *Re Thackwray and Young's Contract* (1888), 40 Ch. D., at p. 40.

(*p*) *Hipgrave* v. *Case* (1885), 28 Ch. D. 356; *Nicholson* v. *Brown*, [1897] W. N. 52.

contract, in addition to a claim for specific performance (q). So, too, in an action for specific performance, the vendor cannot at the trial obtain an order for rescission of the contract and forfeiture of the deposit unless there is an alternative claim in the pleadings (r), and NORTH, J., held that this is "a declaration in the nature of a luxury for which the plaintiff ought to pay" (s).

Moreover, if the vendor after obtaining a decree for specific performance moves to have the contract rescinded, he cannot claim damages against the purchaser (t); but he can recover the costs of the specific performance action (u).

SECTION 2.

DAMAGES FOR BREACH OF CONTRACT.

Action by Vendor.—If the purchaser refuses to perform his part of the contract, the vendor can either rescind the contract and sue the purchaser on a *quantum meruit* for expenses incurred (x), or can bring an action for general damages actually sustained by the breach of contract (y).

The amount which the vendor is entitled to recover is merely damages and not a liquidated demand, and, therefore, he cannot specially indorse his writ under

(q) *Hipgrave* v. *Case* (1885), 28 Ch. D. 356, at p. 361.

(r) *Stone* v. *Smith* (1887), 35 Ch. D. 188; *Kingdon* v. *Kirk* (1887), 37 Ch. D. 141.

(s) *Ibid.*, at p. 142.

(t) *Henty* v. *Schröder* (1879), 12 Ch. D. 666.

(u) *Olde* v. *Olde*, [1904] 1 Ch. 35.

(x) *De Bernardy* v. *Harding* (1853), 8 Ex. 822.

(y) *Laird* v. *Pim* (1841), 7 M. & W. 474.

Order III., r. 6 (*z*). If the vendor seeks to recover the whole purchase money he must proceed by way of specific performance.

It should be borne in mind that the doctrine of part performance does not enable the court to award damages on a parol contract in a case where the court could not have given specific performance (*a*).

It is, as a rule, an essential averment in the plaintiff's pleadings in an action for damages that he is ready and willing to make the assignment (*b*); but if there is a distinct refusal by the purchaser to be bound by the terms of the contract (although such repudiation is prior to the time fixed for completion), the vendor can, if he pleases, treat the contract as rescinded, and at the same time sue for damages (*c*).

Where there is a condition enabling the vendor to forfeit the deposit, the usual course pursued by the vendor is to forfeit the deposit and resell the property. In that case he can recover from the purchaser the deficiency on the resale, but in assessing such deficiency he must take into consideration the amount of the deposit (*d*).

Action by Purchaser.—On the other hand, if the vendor makes default, the purchaser can either rescind the contract and sue the vendor for the

(*z*) *Leader* v. *Tod-Heatly*, [1891] W. N. 38.

(*a*) *Lavery* v. *Pursell* (1888), 39 Ch. D. 508.

(*b*) *Ellis* v. *Rogers* (1885), 29 Ch. D., at p. 667; but see Order XIX., r. 14.

(*c*) See the doctrine of *anticipatory breach*, explained in *Johnstone* v. *Milling* (1886), 16 Q. B. D. 460.

(*d*) *Ockenden* v. *Henly* (1858), 27 L. J. Q. B. 361. See *ante*, p. 289.

deposit, or he can bring an action for damages on the ground of non-performance (*e*).

It has, however, been established by the "rule in *Flureau* v. *Thornhill*" (*f*), that, upon a contract for the purchase of real estate, if the vendor, *without fraud*, is incapable of making a good title, the intended purchaser is not entitled to any compensation for *the loss of his bargain*. If the vendor is guilty of fraud, the purchaser can, of course, recover damages by an action for deceit (*g*).

It was formerly considered that this rule was subject to two exceptions, viz.: (1) where the vendor at the time of entering into the contract knew he had no title (*h*); and (2) where the breach of contract arose, not from the inability of the vendor to give a good title, but from *his refusal to take the necessary steps to carry out the contract* (*i*). These exceptions were doubted by Lord CHELMSFORD and Lord HATHERLEY in *Bain* v. *Fothergill* (*k*), and Lord CHELMSFORD stated his opinion that "the limits within which damages may be recovered upon the breach of a contract for the sale of real estate must be taken to be *without exception*." But the decision of the Court of Appeal in *Day* v. *Singleton* (*l*) establishes that the second exception is still good law. The rule which limits damages is an anomalous rule, based upon and

(*e*) Dart, Vendors and Purchasers, 7th ed., 984.

(*f*) (1776), 2 W. Bl. 1078; see also *Tyrer* v. *King* (1845), 2 C. & K. 149; *Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158.

(*g*) *Bain* v. *Fothergill*, *supra*, at p. 207.

(*h*) *Hopkins* v. *Grazebrook* (1826), 6 B. & C. 31.

(*i*) *Engell* v. *Fitch* (1869), L. R. 4 Q. B. 659.

(*k*) (1874), L. R. 7 H. L. 158.

(*l*) [1899] 2 Ch. 320.

justified by difficulties in showing a good title to real property in this country, and ought not to be extended to cases in which the reasons on which it is based do not apply (*m*).

Although, however, the purchaser is not entitled to damages for loss of his bargain, he can recover his deposit together with interest, the expenses incurred in the investigation of the vendor's title, and possibly the costs of drawing the contract of sale (*n*).

The decision in *Hodges* v. *Earl of Litchfield* (*o*), which is still, it is presumed, good law, lays down the limits of the purchaser's right to reimbursement when the vendor is unable to make a good title. According to this decision the purchaser *cannot recover:* (1) expenses incurred prior to the contract of sale; (2) the expense of a survey of the estate; (3) the expenses of a draft conveyance; (4) the difference between party and party and solicitor and client costs of a specific performance action; (5) losses sustained on the resale of stock purchased for the estate. But he is entitled to recover the expenses of comparing deeds, searching for judgments, and of journeys for that purpose.

A distinction seems to have been made between ordinary damages, and damages *in the nature of compensation*, which are given in actions for specific performance in accordance with the established practice of the Court of Chancery (*p*). Thus, in actions for specific performance, whether brought by the

(*m*) [1899] 2 Ch., at p. 329.

(*n*) *Pearl Life Assurance Co.* v. *Buttenshaw*, [1893] W. N. 123.

(*o*) (1835), 1 Bing. N. C. 492.

(*p*) *Phelps* v. *Prothero* (1855), 7 De G. M. & G., at p. 734.

vendor or the purchaser, the purchaser can recover damages in respect of loss occasioned by the vendor's delay in performing his contract (*q*).

The measure of such damages is arrived at by considering what "may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract" (*r*).

SECTION 3.

SPECIFIC PERFORMANCE.

General Principles.—Specific performance of the contract will be enforced at the instance of either vendor or purchaser if there be a valid contract, and such as, having regard to the circumstances, ought to be enforced.

A court of equity will grant specific performance unless there has been some conduct on the part of the plaintiff disentitling him to relief in equity or in some rare instances where there would be a great hardship imposed on an innocent vendor or purchaser by reason of some mistake which he has made although the other party has not contributed to it (*s*).

Mistake and Unfairness.—Any circumstance of *unfairness* on the part of the plaintiff or those under

(*q*) *Jaques* v. *Millar* (1877), 6 Ch. D. 153; *Royal Bristol Permanent Building Society* v. *Bomash* (1887), 35 Ch. D. 390; *Jones* v. *Gardner*, [1902] 1 Ch. 195.

(*r*) *Jaques* v. *Millar* (1877), 6 Ch. D. at p. 160.

(*s*) *Rudd* v. *Lascelles*, [1900] 1 Ch. 817.

whom he claims, or even any circumstance of *hardship* in the defendant's situation, will incline the court not to grant this special equitable relief, but to leave the party to his legal remedy in damages (*t*).

Thus, not only is fraud or material misrepresentation on the part of the plaintiff a good defence to an action of this character, but the defendant will not be compelled to perform a contract which he entered into under a reasonable misapprehension as to its effect. In such a case it is generally necessary for the defendant to show that the mistake was contributed to by the plaintiff, however unintentionally, as, for instance, that there was in the description of the property a matter on which a person might bonâ fide make a mistake (*u*), and he must show that he exercised a reasonable amount of care to ascertain what he was buying (*v*).

A written contract cannot be impeached simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed (*w*), unless the mistake is induced by the conduct of the other party (*x*). This principle, however, only applies to mistakes as to construction of a written agreement, and does not extend to a mistake as to the subject-matter dealt with by the contract (*y*). If there is a misapprehension as to the

(*t*) *Gould* v. *Kemp* (1834), 2 My. & K. 308.

(*u*) *Swaisland* v. *Dearsley* (1861), 29 Beav. 430; *Baskcomb* v. *Beckwith* (1869), L. R. 8 Eq. 100.

(*v*) *Tamplin* v. *James* (1880), 15 Ch. D. 215.

(*w*) *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108.

(*x*) *Wilding* v. *Sanderson*, [1897] 2 Ch. 534.

(*y*) *Ibid.*, at p. 550; *Van Praagh* v. *Everidge*, [1903] 1 Ch., at p. 436.

substance of the thing there is no contract; on the other hand if it be only a mistake as to some quality or incident, even though the misapprehension may have been the actuating motive of the purchaser, yet the contract remains binding (z).

A plaintiff who is mistaken in the construction of an agreement, may waive his construction and obtain specific performance according to the construction admitted by the defendant (a).

In any case, however, the court will refuse specific performance if the plaintiff "snapped at an offer which he must have perfectly well known to be made by mistake" (b).

Hardship.—It must not be supposed that in every case of hardship the court will refuse to grant specific performance, and in one case Lord ROMILLY pointed out that "you cannot exercise a discretion by merely considering what as between the parties would be fair to be done; what one person may consider fair, another person may consider very unfair" (c). The cases in which the court has refused specific performance on the ground of hardship may, it is submitted, be classed under four heads, viz.:

(1) Where to decree specific performance would compel the defendant to commit a breach

(z) *Kennedy* v. *Panama, etc. Mail Co.* (1867), L. R. 2 Q. B. 588.

(a) *Preston* v. *Luck* (1884), 27 Ch. D. 497.

(b) *Webster* v. *Cecil* (1861), 30 Beav. 62; *Tamplin* v. *James* (1880), 15 Ch. D. 221.

(c) *Haywood* v. *Cope* (1858), 25 Beav. 151.

of duty, *e.g.*, a breach of trust, or a breach of contract (*d*).

(2) Where the execution of the contract would render the defendant liable to forfeiture (*e*).

(3) Where the contract if enforced would render the purchaser liable to criminal proceedings, or subject him to obloquy (*f*).

(4) Where the purchaser would be buying a law suit (*g*).

Parol Variation of Contract.—If the defendant signed the contract of sale upon the faith of a parol undertaking by the plaintiff which varied the terms of the written agreement, this undertaking may be set up as a defence to an action for specific performance (*h*). It seems to be of no consequence whether the parol agreement precede or be contemporaneous with the contract (*i*).

It must be remembered that there is a well-established distinction between a person seeking and a person resisting specific performance. The defendant, as we have seen, may adduce parol evidence to show fraud or mistake, but the plaintiff cannot do so for the purpose of obtaining specific performance with a variation (*k*).

(*d*) *Willmott* v. *Barber* (1880), 15 Ch. D. 96.

(*e*) Fry, Specific Performance, § 429.

(*f*) *Hope* v. *Walter*, [1900] 1 Ch. 257.

(*g*) Fry, § 890; and see *ante*, p. 388.

(*h*) *Hammersley* v. *De Biel* (1845), 12 Cl. & F. 45.

(*i*) *Lindley* v. *Lacey* (1864), 34 L. J. C. P., at p. 9.

(*k*) *Woollam* v. *Hearn* (1802), Wh. & Tu., L. C. Eq. 8th ed., Vol. II., 517, and notes thereon; *May* v. *Platt*, [1900] 1 Ch. 622; *Thompson* v. *Hickman*, [1907] 1 Ch. 550; Williams, Vendor and Purchaser, 2nd ed., 788—791.

This rule, however, only applies to cases of *unilateral* mistake, the remedy for which is rescission, and not rectification (*l*), and does not apply to a mistake *common to both parties*, when the proper remedy is to rectify by substituting the terms really agreed to. Thus, if the court is satisfied that there has been a mutual mistake in the reduction of the contract into writing, and there has been such a part performance as to take the contract out of the Statute of Frauds, the court will rectify the mistake and enforce specific performance of the contract as rectified (*m*).

Subsequent Variation.—The subsequent conduct of the parties to a contract is never admissible in explanation of its terms except in the case of ancient documents under the doctrine of *contemporanea expositio;* but subsequent conduct may be evidence of a fresh agreement varying the terms of the old. Where, however, the contract is required by law to be in writing, as in the case of a contract for the sale of land, there is authority for the proposition that parol evidence of a subsequent agreement varying the terms is inadmissible "even when adduced on behalf of the defendant" (*n*); and it is conceived that in no case can the defendant set up a substituted verbal agreement and at the same time plead the Statute of Frauds (*o*). On the other hand,

(*l*) *Paget* v. *Marshall* (1884), 28 Ch. D. 255.

(*m*) *Olley* v. *Fisher* (1886), 34 Ch. D. 367; *Shrewsbury and Talbot Cab, etc., Co.* v. *Shaw* (1890), 89 L. T. Jo. 274. Of course, there must be a *concluded contract* in order to obtain rectification.

(*n*) *Vezey* v. *Rashleigh*, [1904] 1 Ch. 636.

(*o*) This was done in *Stead* v. *Dawber* (1839), 10 A. & E. 57, pp. 64, 65, but this case would not now, it is conceived, be followed.

parol evidence is always admissible for the purpose of showing that there was no agreement at all (*p*), or that the agreement has been rescinded (*q*).

SECTION 4.

SPECIFIC PERFORMANCE WITH COMPENSATION.

Purchaser's Right to what the Vendor has.—The general rule of specific performance is, that where it appears that the vendor cannot convey all he has contracted to give, the purchaser is entitled to what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation (*r*). Thus, where there is any defect in the *quantity* or *quality* of the land sold, the purchaser is generally entitled to specific performance with compensation, whether there is a condition as to compensation or not. Upon the same principle, if a vendor having only a partial interest, such as a life estate, *acts as an absolute owner*, and contracts to sell the fee simple, the purchaser can compel him to convey such estate as he possesses, and can enforce a partial performance of the contract with an abatement in the purchase money (*s*). The difficulty in such a case is to ascertain what is a just price.

Where the bargain between the parties contains no provision for compensation, or such provision

(*p*) *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.

(*q*) *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634.

(*r*) *Hill* v. *Buckley* (1811), 17 Ves. 394.

(*s*) *Thomas* v. *Dering* (1837), 1 Keen, 729; *Mortlock* v. *Buller* (1804), 10 Ves. 315; *Hooper* v. *Smart* (1874), L. R. 18 Eq. 683.

does not apply, the court will not enforce partial specific performance in the following cases:

(1) Where there is no evidence of improper conduct or misrepresentation on the part of the vendor (*t*).

(2) Where the purchaser knew of the limited interest of the vendor (*u*).

(3) Where performance of the contract would be unreasonable or prejudicial to other persons interested in the property (*v*).

(4) Where it is impossible to assess the compensation (*w*).

SECTION 5.

ANCILLARY ORDERS AND COSTS IN SPECIFIC PERFORMANCE ACTIONS.

Form of Judgment.—The ordinary judgment (formerly called "decree") in a specific performance action simply declares the rights of the plaintiff and directs an inquiry as to title, if not proved at the hearing or waived by the purchaser, with other consequent directions as to accounts and conveyance. The ultimate direction is in form conditional, viz., that on due execution of the conveyance the purchase money be paid (*x*), and, therefore, cannot be enforced by any process of execution.

(*t*) *Price* v. *Griffiths* (1851), 1 De G. M. & G. 80; *Lumley* v. *Ravenscroft*, [1895] 1 Q. B. 683.

(*u*) *Hopcraft* v. *Hopcraft* (1897), 76 L. T. 341.

(*v*) *Thomas* v. *Dering* (1837), 1 Keen, at p. 747; *Naylor* v. *Goodall* (1877), 47 L. J. Ch. 53.

(*w*) *Rudd* v. *Lascelles*, [1900] 1 Ch. 815.

(*x*) Seton, p. 2237.

Enforcement in Vendor's Action.—In a vendor's action, if the defendant purchaser prove recalcitrant, the plaintiff must resort to one of the following remedies:

(1) The plaintiff may execute the conveyance as an escrow and deposit it with the title-deeds in court, and thereupon obtain a peremptory "four day order" for payment to him of the purchase money. This form of order, sometimes known as the order in *Morgan* v. *Brisco* (*y*), may be enforced by *fieri facias*, *elegit* or sequestration.

(2) Instead of executing a conveyance, the plaintiff may obtain a peremptory order for payment of the purchase money into court to the credit of the action. Such an order can be enforced by writ of sequestration but in no other way (*z*).

(3) The plaintiff (when there is the usual condition as to forfeiture of the deposit and resale of the property) may obtain an order declaring his right to forfeit the deposit and resell the property and giving judgment for the difference between the purchase price and the price realised on the resale (*a*).

(4) The plaintiff may obtain an order for rescission of the contract and costs (*b*). If the order

(*y*) (1886), 32 Ch. D. 192.

(*z*) R. S. C., Order XLII. r. 4; *Robinson* v. *Galland* (1889), 37 W. R. 396.

(*a*) *Griffiths* v. *Vezey*, [1906] 1 Ch. 796.

(*b*) *Olde* v. *Olde*, [1904] 1 Ch. 35.

is taken in this form no claim to damages can be made, but the plaintiff is entitled to an order authorising him to retain the deposit, even where there is no express condition as to forfeiture, since this is in the nature of an earnest or guarantee for the fulfilment of the contract as well as a part payment of the purchase money (c).

Enforcement in Purchaser's Action.—In a purchaser's action, if the vendor is in default, the plaintiff's remedy is more simple, viz., to pay the purchase money into court and obtain a vesting order or an order appointing some person to convey under ss. 31, and 33, of the Trustee Act, 1893 (d).

Costs.—Lastly, with regard to the costs of obtaining specific performance, the general rule in a vendor's action is that if he does not show a good title before the commencement of the action, he must pay the costs up to the time when a good title was first shown (e). But, if the purchaser raises the defence that there is no contract there is a question prior to the question of title, and the costs of establishing the prior question fall upon the purchaser (f).

In a purchaser's action, it is presumed that if the action is commenced prematurely and the vendor does not resist specific performance and shows a good title,

(c) *Hall* v. *Burnell*, [1911] 2 Ch. 551.

(d) Seton, pp. 2287, 2288.

(e) *Ibid.*, pp. 2236, 2258.

(f) *Abbott* v. *Calton* (1853), 22 L. J. Ch. 936; and see *Halkett* v. *Dudley*, [1907] 1 Ch., at p. 607.

the plaintiff would be mulcted in costs. If the certificate was against the title, a purchaser's action before the Judicature Act was dismissed without costs (*g*). But, since the Act, the purchaser, if he makes an alternative claim to damages in case a good title is not shown (*h*), is entitled to the costs of the action (*i*). If, however, the purchaser elects to complete notwithstanding that the certificate is against the title, he may be ordered to pay the costs of the inquiry (*k*).

SECTION 6.

SUMMARY APPLICATIONS IN CHAMBERS.

Vendor and Purchaser Summons.—The Vendor and Purchaser Act, 1874, s. 9, provides that a vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may, at any time or times, and from time to time, apply in a summary way to a judge of the Court of Chancery in England in chambers in respect of any requisitions or objections or any claim for compensation, or any other question arising out of, or connected with, the contract (*not being a question affecting the existence or validity of the contract*); and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne

(*g*) *Malden* v. *Fyson* (1846), 9 Beav. 347.

(*h*) See Seton, p. 2228.

(*i*) *Pearl Life Assurance Co.* v. *Battenshaw*, [1893] W. N. 123.

(*k*) *Bennett* v. *Fowler* (1840), 2 Beav. 302.

and paid. A vendor or purchaser of real or leasehold estates in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland; and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

What Questions Decided.—The object of this section is to enable either vendor or purchaser to obtain the decision of the court upon some *isolated point*, instead of being compelled to have recourse to an action for damages or specific performance. Questions whether the vendor has shown a good title (*l*); or has sufficiently answered the purchaser's requisitions (*m*); to what interest (if any) on the purchase money the vendor is entitled (*n*); or whether, owing to the conduct of one of the parties, the other party is entitled to rescind the contract (*o*), and as to the form and contents of the conveyance (*p*), are now decided upon vendor and purchaser summons.

An isolated point, such as the form of the conveyance, may be dealt with on a vendor and purchaser

(*l*) *Re Burroughs, Lynn and Sexton* (1877), 5 Ch. D. 601. *Cf.*, however, dicta of KEKEWICH, J., in *Re Wallis and Barnard's Contract*, [1899] 2 Ch. at pp. 519, 520.

(*m*) *Re Ford and Hill* (1879), 10 Ch. D. 365; *Re Glenton and Saunders* (1885), 53 L. T. 434.

(*n*) *Re Mayor of London and Tubb's Contract*, [1894] 2 Ch. 524.

(*o*) *Re Jackson and Woodburn's Contract* (1887), 37 Ch. D. 44; *Re Jackson and Haden*, [1906] 1 Ch. 412.

(*p*) *Re Agg.-Gardner* (1884), 25 Ch. D. 600; *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41.

summons, even though the respondent asserts that he is in a position altogether to repudiate the contract (*q*). But an application for the construction of a difficult document forming part of the title ought not to be made under this section, but by originating summons, and if the vendor insists upon proceeding by vendor and purchaser summons, the court may declare the title too doubtful to be forced on the purchaser (*r*).

Extent of Jurisdiction.—The court has no jurisdiction on an application under this section to award special damages, or damages in the nature of compensation, as, for instance, where the purchaser has suffered loss owing to the vendor's delay in completion (*s*). Nor can it determine any question involving the existence or validity of the contract, *e.g.*, whether a condition of sale is fraudulent (*t*).

The Act, however, empowers the judge to "make such order as to him shall appear just," that is to say, to direct such things to be done as are the natural outcome of his decision. Consequently, the court can order the return of the deposit to the purchaser with interest from the time when it was paid (usually at 4 per cent.), and also can give the purchaser the costs of investigating the vendor's title (*u*).

(*q*) *Re Hughes and Ashley's Contract*, [1900] 2 Ch. 595.

(*r*) *Re Nichols and Von Joel's Contract*, [1910] 1 Ch. 43.

(*s*) *Re Wilson's and Stevens' Contract*, [1894] 3 Ch. 546.

(*t*) *Re Sandbach and Edmondson's Contract*, [1891] 1 Ch. 102.

(*u*) *Re Hargreaves and Thompson's Contract* (1886), 32 Ch. D. 454.

If the vendor takes out a summons claiming that a good title has been shown and fails, the purchaser can at the hearing obtain an order for rescission and return of his deposit (*v*).

(*v*) *Re Walker and Oakshott's Contract*, [1901] 2 Ch. 383.

PART VI.

OF COMPLETION AND MATTERS RELATING THERETO.

CHAPTER XVII.

OF ASSURANCES TO PURCHASERS.

SECTION 1.

PREPARATION OF ASSURANCES.

Form of Assurance.—The title of the vendor to the property sold having been investigated and accepted by the purchaser, the next matter for consideration is its conveyance to him.

Estates of freehold tenure are conveyed by deed of grant.

Estates of leasehold tenure are transferred by deed of assignment.

Estates of copyhold tenure are assured by means of surrender into the hands of the lord of the manor of which the same are holden, and admittance of the purchaser in terms of such surrender.

In the case of a sale of property the conveyance or assurance is always prepared by the purchaser who is entitled to have it in any form he reasonably

requires (*a*). The contract usually stipulates that the costs of the preparation of the assurance to the purchaser and of all matters connected therewith shall be borne by him, though in the absence of such a stipulation he is bound to bear the expense, and in the case of an estate of copyhold tenure both of the surrender and admittance.

Time for Preparation of Assurance.—The preparation of the conveyance or assignment will not operate as a waiver of objections to or requisitions upon the title (*b*), and it is usually prepared before search is made for incumbrances, such search being in fact usually made immediately before the completion of the purchase; and it is submitted that notwithstanding the contract may provide that all objections to or requisitions upon or in respect of the title shall be made within a specified time, still, in the event of any incumbrance being discovered upon search being made after that period, the purchaser is entitled to take objection in respect thereof, the abstract of title being rendered imperfect by the non-disclosure thus discovered (*c*). But the assurance should not be prepared until the deeds have been produced.

SECTION 2.

AS TO THE PARTIES MAKING THE ASSURANCE.

Who must be made Parties.—The first matter which will suggest itself when the estate is of freehold

(*a*) Williams, Vendor and Purchaser, Vol. I., 546; and see *Re Sansom and Narbeth*, [1910] 1 Ch. 741.

(*b*) *Burroughs* v. *Oakley* (1819), 3 Swans. 159.

(*c*) Dart, Vendors and Purchasers, 7th ed., 174; and see *Want* v. *Stallibrass* (1873), L. R. 8 Ex., at p. 185, *ante*, p. 298.

or leasehold tenure will be the parties to the conveyance or assignment, by which the same and all outstanding interests therein are to be conveyed or transferred.

The estate may be vested in trustees for sale or in a mortgagee or other parties occupying a fiduciary capacity, deriving their power of sale under some or one of the Acts to which reference has been made, or the vendor may have contracted to sell subject to or discharged from certain incumbrances, or by reason of disability he or she may be unable alone to make a valid assurance.

Should the estate be vested in a trustee or trustees for sale, it will of course have been ascertained in the investigation of the title that the events have taken place upon the happening of which the power of sale was exercisable, and that the necessary consents, if any, to the exercise thereof have been obtained, and that the parties executing the power have full and complete authority conferred upon them by the instrument creating the trust or by statutory enactment.

If the vendor is a mortgagee duly exercising a power of sale conferred by his mortgage deed, or by the Conveyancing Act, 1881, he cannot, of course, be required to procure the concurrence of the mortgagor. A mortgagee can sell under his power after foreclosure absolute, but after an order *nisi* and before the order has been made absolute the power of sale is suspended (*d*).

If the estate is at the time of the contract subject to but sold free from incumbrances, such incumbrances

(*d*) *Stevens* v. *Theatres, Limited*, [1903] 1 Ch. 859.

must, as we have seen, be discharged by a separate deed at the vendor's expense, or if the incumbrancers concur in the assurance to the purchaser, the vendor must bear the additional expense thereby occasioned, and the same rule applies to any outstanding estate or interest.

A mortgagee is not bound to reconvey before the time fixed for redemption (e), and he cannot be compelled to reconvey by any other description than that under which the property was vested in him, nor by a deed containing incorrect recitals (f).

If the purchaser has notice of an equitable incumbrance, he must ascertain for himself that the charge has been satisfied. In order to get a good title, it is for him to see that the outstanding interest is got in or destroyed, unless indeed the owner of the interest has been guilty of some conduct which renders it inequitable or improper on his part to set up his outstanding interest against the purchaser (g). A purchaser is not bound to accept an indemnity in respect of an incumbrance even although the incumbrance is only contingent (h); but he may be bound by a condition to assume that an incumbrance has been discharged (i).

If the purchaser has accepted the vendor's title, he is entitled to redeem a prior mortgage of the property, and may, it is presumed, deduct the redemption money

(e) *Brown* v. *Cole* (1845), 14 Sim. 427.

(f) *Goodson* v. *Ellisson* (1826), 3 Russ. 594.

(g) *Jared* v. *Clements*, [1903] 1 Ch. 428.

(h) *Re Weston and Thomas's Contract*, [1907] 1 Ch. 244.

(i) *Hopkinson* v. *Chamberlain*, [1908] 1 Ch. 853.

from the purchase price (*k*). A mortgage made by the vendor after the date of the contract does not affect the rights of the purchaser, except in the case of a legal mortgage to a mortgagee who has no notice of the contract of sale (*l*).

Upon the sale of a bankrupt's estate, he usually joins in the conveyance and covenants for title, and the Bankruptcy Act, 1880, directs that the bankrupt shall execute such conveyances, etc., and do all such acts and things in relation to his property as may be reasonably required by the trustee. It is, however, questionable whether there is really any advantage in making the bankrupt a party when the purchase money is paid to the trustee (*m*).

In the case of a conveyance by a liquidator of a company under ss. 151, 186 of the Companies (Consolidation) Act, 1908, the company must always be made a party, but the sanction of the Court or committee of inspection is now unnecessary (*n*).

If the contract stipulates that certain persons shall join in the conveyance whose consent is, in fact, unnecessary, the vendor cannot on that account decline to procure their concurrence (*o*).

(*k*) *Pearce* v. *Morris* (1869), L. R. 5 Ch. 227; Dart, Vendors and Purchasers, 7th ed., 612.

(*l*) *Flinn* v. *Pountain* (1889), 37 W. R. 443.

(*m*) Dart, Vendors and Purchasers, 7th ed., 538.

(*n*) Companies (Consolidation) Act, 1908, s. 151 (2) (*b*).

(*o*) *Benson* v. *Lamb* (1846), 9 Beav. 502.

SECTION 3.

AS TO THE PARTIES TO WHOM THE ASSURANCE IS MADE.

To whom Vendor must Convey.—The next consideration will be the party or parties in whom the estate is to be vested. An ordinary contract of sale is not only to convey to the purchaser, but to convey *as the purchaser shall direct*. When it is simply a question of convenience to the purchaser, not involving any matter of substance affecting the vendor, it is idle for the vendor to raise objections to the form of conveyance (*p*). So long as he does not increase the burden cast upon the vendor, the purchaser may require the property to be conveyed in any number of lots and to any number of persons; and the vendor cannot object to convey on his being paid the additional expense occasioned by his joining in several conveyances instead of one (*q*). It is not, however, in the contemplation of the parties that the vendor shall remain a trustee for the purchaser for an indefinite period; and, therefore, the purchaser is bound to accept a conveyance to himself or his nominees, and cannot elect to rely upon his equitable title or require the vendor to keep his legal estate for a long period and convey it in portions at various times (*r*).

Purchase in Name of Another.—If an assurance is made to a person who does not actually pay the purchase money, a trust is thereby implied in favour

(*p*) *Cooper* v. *Cartwright* (1860), John. 684.
(*q*) *Earl of Egmont* v. *Smith* (1877), 6 Ch. D. 469, at p. 474.
(*r*) *Re Cary-Elwes' Contract*, [1906] 2 Ch., at p. 149.

of the person paying the amount, and parol evidence to prove that such is the case will be admitted in a court of equity. If, however, the purchase be taken in the name of a wife, child or children, grandchild or illegitimate child, or any person to whom the purchaser stands *in loco parentis*, it will be assumed that the purchase was intended as an advancement, unless evidence is produced to negative such a presumption (*s*).

Conveyance to Partners.—When real estate is purchased for partnership purposes it will be desirable to take the conveyance unto and to the use of the partners, as joint tenants at law, upon trust for such partners as part of the personal estate of the partnership, according to the shares and interests of the partners therein.

But if the conveyance be made to the partners as joint tenants merely, though there would be a survivorship at law in case of the death of either of them, still, in equity, the survivor would hold the share of the deceased partner in the estate as a trustee for his representatives (*t*); and the same rule would apply to a purchase by two or more for the purpose of a joint speculation (*u*).

Conveyance to Joint Tenants.—When a purchase is made by trustees for the purposes of their trust, the

(*s*) See *Dyer* v. *Dyer* (1788), Wh. & Tu., L. C. Eq., 8th ed., Vol. II., 820, and notes thereto.

(*t*) *Morris* v. *Barnett* (1829), 3 Y. & J. 384; and *cf.* 53 & 54 Vict. c. 39, s. 20.

(*u*) *Lake* v. *Craddock* (1732), Wh. & Tu., L. C. Eq., 8th ed., Vol. II., 973.

property is vested in them as joint tenants. It is usual, in the case of a conveyance to trustees, either not to disclose the trusts at all, or to convey to them upon trust for sale, the trusts of the proceeds being disclosed by a separate deed which does not concern a subsequent purchaser. The ordinary recitals and forms used in conveyances to trustees, with the view of keeping all notice of the trust off the title, are not misrepresentations on the face of the document which will displace the equitable title of the *cestui que trust* (*x*).

In all cases where land is conveyed on sale to more than one person so as to create a joint tenancy, if the purchase money has been advanced by them in equal shares, such joint tenancy will exist both at law and in equity (*y*); but if the purchase money be paid in unequal proportions, the purchasers are entitled in equity to the property in the shares in which the purchase money was paid by them (*z*). If persons entitled to an equitable estate as tenants in common take a conveyance of the legal estate to themselves as joint tenants, a joint tenancy is created in law and equity; since two or more persons cannot be trustees for themselves for an estate co-extensive with their legal estate (*a*).

Conveyance to Husband and Wife.—If land is conveyed to a *husband and wife*, they no longer take

(*x*) *Carritt* v. *Real and Personal Advance Co.* (1889), 42 Ch. D. 263.

(*y*) *Aveling* v. *Knipe* (1815), 19 Ves. 441.

(*z*) *Lake* v. *Gibson* (1729), 1 Eq. Ca. Abr. 291; Wh. & Tu. L. C. Eq., 8th ed., Vol. II., 973; and Sugden, Vendors and Purchasers, 11th ed., 902.

(*a*) *Re Selous*, [1901] 1 Ch. 921.

as tenants by *entireties*, but as joint tenants, the wife's interest belonging to her for her separate use; but if land is conveyed to a husband and wife and a *third party*, as between them and such third party, the husband and wife are regarded as one person, and only take a moiety of the estate (*b*).

Rights of Persons not Parties to a Deed.—Prior to the Real Property Act, 1845, when a deed was in the form of an indenture, every person taking any immediate benefit under it was made a party thereto. But that Act (*c*) provides that under an indenture an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture (*d*).

A person dead at the date of a deed can take no interest under it (*e*); and seems doubtful whether a person non-existent at the date of a deed can enforce a covenant contained in it (*f*), unless the covenant is entered into with a trustee for such non-existent person, or unless, of course, such person is an assignee of the benefit of the covenant.

(*b*) *Re Jupp* (1888), 39 Ch. D. 148; *Thornley* v. *Thornley*, [1893] 2 Ch. 229. Cf. *R. Jeffery*, [1914] 1 Ch. 375.

(*c*) 8 & 9 Vict. c. 106, s. 5.

(*d*) *Ibid.*, s. 5, which repealed 7 & 8 Vict. c. 76, s. 11, which was a similar provision.

(*e*) *Re Tilt* (1896), 74 L. T. 164.

(*f*) *Kelsey* v. *Dodd* (1882), 52 L. J. Ch., at p. 39.

SECTION 4.

RECITALS.

What Facts should be Recited.—Following the parties to the assurance will be the recital of such facts and circumstances as are necessary to explain the position and interests of the parties executing the instrument; thus, if the vendor is seised in fee, the fact of the seisin will be recited, and that he has contracted with the purchaser for sale of the estate, which will be sufficient without referring to any contract previously entered into between the parties, whether the sale was by auction or otherwise.

If the vendor possesses a power of appointment over the estate which it is intended shall be exercised by him, the instrument creating the power should be recited.

If the sale is by a mortgagee or trustee in exercise of a power of sale, the instrument creating the power should be recited, and the material parts of the power set out *verbatim*.

If the sale is effected by a mortgagor and mortgagee, it will be sufficient to recite that the mortgage has been effected, that the money remains owing on the security, and that the mortgagor and mortgagee have contracted with the purchaser for the sale to him of the estate.

If incumbrancers join in the conveyance to release or discharge the property from their charges thereon, the nature of such charges and the documents creating them must be recited; or should the estate sold be subject to outstanding charges or incumbrances, the documents effecting them should also be recited.

If the estate be of leasehold tenure, the lease under which the property is held by the vendor should be recited, and when the intermediate dealings with the property have been extensive, it will be sufficient after the recital of the lease to recite that by divers mesne assignments and other acts in the law and events the property has become vested either in the vendor or in some former owner from whom it may be necessary under the circumstances to trace the title on the purchase deed, such as the mortgagor or testator. Recitals may occasionally be looked to in order to interpret an ambiguity in the operative part of a deed, *e.g.*, to control general words or explain an ambiguous covenant.

Estoppel by Recital.—The recital of a particular fact may operate as an *estoppel*, but the statement must be distinct and precise. A recital that the vendor is seised probably constitutes an estoppel, so that if he acquire the legal estate after the conveyance, it will pass to the purchaser by virtue of the estoppel. But a recital that the vendor is "seised or otherwise well and sufficiently entitled," is too ambiguous to create an estoppel (*g*). A grantor cannot be estopped from denying that he had the legal estate unless there is an express statement in the deed that he had it (*h*). An erroneous recital in a conveyance as to the derivation of the grantor's title does not estop

(*g*) *Heath* v. *Crealock* (1874), L. R. 10 Ch. 30; *General Finance, Mortgage and Discount Co.* v. *Liberator Permanent Building Society* (1878), 10 Ch. D. 15.

(*h*) *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 14.

the grantee from showing what interest has really passed to him (*i*).

In cases where the statutory forms, given by the Conveyancing Act, 1881, are strictly adhered to, recitals will be omitted; but it is the practice of conveyancers to adopt the form of recital in use before the Act.

SECTION 5.

THE TESTATUM.

Contents of Testatum.—Following the recitals will come the testatum, containing the consideration and the operative words of conveyance or assignment to the grantee or assignee. If it is desired to imply covenants for title, the vendor must convey as beneficial owner, mortgagee, trustee or settlor, as the case may be (*k*).

Prior to the Conveyancing Act the operative words used for the conveyance of freehold property by deed of grant were "grant" or "grant and convey," but although the word "grant" was technically the proper term, its employment was not absolutely necessary, and other words indicating an intention to grant would have been effectual. The Act (*l*) provides that the use of the word "grant" is not necessary to convey tenements or hereditaments, corporeal or incorporeal, and since it came into operation the word "convey" has become commonly used.

(*i*) *Trinidad Asphalte Co.* v. *Coryat*, [1896] A. C. 587.

(*k*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 7.

(*l*) S. 49. The section applies to conveyances made before or after the Act.

The words "give" or "grant" in a deed executed after October 1st, 1845, do not imply any covenant at law in respect of any tenements or hereditaments, except so far as they may do so by force of any Act of Parliament (*m*).

Section 50 of the Conveyancing Act enacts that freehold land may be conveyed by a person to himself *jointly with another person* by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by *a husband to his wife*, and by *a wife to her husband*, alone or jointly with another person. With regard to copyholds, a husband may surrender his own estate to the use of his wife, or the wife to that of her husband, for the conveyance is through the intervention of the lord (*n*).

In this part of the deed, the estate limited need not be defined, but the conveyance or assignment should be to the grantee or assignee by name. It is necessary that the grantee should be named in a grant, otherwise it can in law have no operation; but if the grant does not intend to describe the grantee by his known name, it may be good by a certain description of the person without either surname or name of baptism (*o*).

Consideration.—The Stamp Act of 1891 (*p*) enacts, that all facts and circumstances affecting the liability of any instrument to *ad valorem* duty, or the amount of the *ad valorem* duty with which any instrument is

(*m*) Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 4; and see s. 132 of the Lands Clauses Consolidation Act, 1845, *ante*, p. 137.

(*n*) Watkins, Copyholds, 93.

(*o*) *Wray* v. *Wray*, [1905] 2 Ch., at p. 352.

(*p*) 54 & 55 Vict. c. 39, s. 5.

chargeable, are to be fully and truly set forth in the instrument.

When timber or fixtures standing upon the estate are taken at a valuation, the amount thereof must be included in the consideration (*q*), but not the value of chattels which pass by delivery, unless they be assigned by deed, in which case *ad valorem* duty attaches (*r*); and the mere recital of the sale and delivery, unless the articles referred to come within the description of goods, wares, and merchandise, will cause *ad valorem* duty to attach (*s*): but duty does not attach in respect of money paid by way of compensation for damage to adjacent property in the case of a conveyance under the Lands Clauses Consolidation Acts and such amount should not on that account be included in the consideration (*t*).

If copyholds are purchased with other property at one entire price, the consideration in respect of the copyholds should be apportioned, as the *ad valorem* duty in respect of the copyholds will be denoted on the surrender. If the interest of the vendor in the copyholds is equitable only, the deed will be charged with *ad valorem* duty in respect of the copyholds.

SECTION 6.

PARCELS, GENERAL WORDS, ETC.

Parcels.—Very great care should be taken by the purchaser to correctly describe the property intended to be conveyed. It is considered by some practitioners

(*q*) See Conveyancing Act, 1881, s. 6.
(*r*) Dart, Vendors and Purchasers, 7th ed., 551.
(*s*) *Horsfall* v. *Hay* (1848), 2 Ex. 778; 17 L. J. Ex. 266.
(*t*) Dart, Vendors & Purchasers, 6th ed., 599.

that a vendor may insist on a repetition of the exact words of the contract, and may refuse to convey by any other description; but this is a misapprehension. The subject-matter of the contract is not words, but land; and if the purchaser considers that the words used in the contract do not describe the land which he intended to purchase with sufficient distinctness, he has a right to frame a new description, either by means of a plan or otherwise, as he may deem most convenient, so that there can be no doubt as to the effect of the conveyance. The vendor is not at liberty to say that he does not know the boundaries of his own land, or does not know what he meant by the contract. It must be assumed that he does know, and if he knows he must be able to say whether the purchaser's description is correct or not; and he should either admit its correctness or point out where it is incorrect. It follows that in all simple cases in which a plan would assist the description, the purchaser has a right to have a plan on the conveyance, and it is now a common practice to convey by reference to a plan (*u*).

A plan, however, should only be used as an adjunct to the description contained in the body of the deed, and to rely exclusively on the plan for the identification of the property is very careless conveyancing (*x*).

(*u*) *Re Sansom and Narbeth's Contract*, [1910] 1 Ch. 741, where the passage in the text (which is taken from the opinion of an eminent conveyancer) was cited by SWINFEN-EADY, J., as accurately stating the law and the practice (p. 749). See also *Re Sparrow and James' Contract*, [1910] 2 Ch. 60, where it was held that the vendor was not entitled to qualify the conveyance by reference to a plan by adding the words "by way of elucidation and not of warranty."

(*x*) Dart, Vendors and Purchasers, 7th ed., 1011, 1012.

When the description of parcels is made up of more than one part, and one part is true and the other false, then if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as *falsa demonstratio*. It is immaterial in what part of the description the *falsa demonstratio* occurs (*y*).

In cases of sale under the Railway and Waterworks Clauses Acts, if it is the intention that the mines and minerals should pass by the conveyance, they must be specified, as otherwise they will not pass (*z*).

Soil of Highways and Rivers.—The rule of construction is now well settled that where there is a conveyance of land, even though it is described by reference to a plan, and by colour and by quantity, if it is said to be bounded on one side, either by a public thoroughfare or a non-tidal river, then on the true construction of the instrument half the bed of the river or half the road passes (*ad medium filum*); unless there is enough in the circumstances, or enough in the expressions of the instrument, to show that this is not the intention of the parties (*a*). This is the rule laid down in the leading case of *Berridge* v. *Ward* (*b*). The presumption applies in the case of a street in a town (*c*), and also to a highway of limited

(*y*) *Cowen* v. *Truefit*, [1899] 2 Ch. 309. A mistake in a plan may be *falsa demonstratio*. *Eastwood* v. *Ashton*, [1914] 1 Ch. 68, reversing [1913] 2 Ch. 39.

(*z*) 8 Vict. c. 20, s. 77; 10 Vict. c. 17, s. 18.

(*a*) *Micklethwait* v. *Newlay Bridge Co.* (1886), 33 Ch. D. 145.

(*b*) (1861), 10 C. B. (N.S.) 400.

(*c*) *Re White's Charities*, [1898] 1 Ch. 659.

dedication (*d*), but probably does not apply when there has been no dedication to the public at all, or to the case of property bounded by a canal or railway line (*e*).

As to what circumstances are sufficient to rebut this presumption, the reader is referred to the case of *Pryer* v. *Petre* (*f*).

General Words.—Following the parcels it was formerly the practice to insert general words conveying all easements, appurtenances, etc. Very wide general words are, however, now implied by the Conveyancing Act in every conveyance of land unless a contrary intention is expressed in it (*g*), and the clause is now generally omitted accordingly. It would seem indeed that the insertion of express general words is a sufficient indication of contrary intention, upon the principle *expressio unius exclusio alterius* (*h*). But it has been held that the mere fact that adjoining land is referred to as "building land" is insufficient to show a contrary intention (*i*).

It is certainly expedient for the vendor to insert an express proviso excluding the wide general words implied by the Act, where, as not infrequently happens, these words would include rights and easements which

(*d*) *Smith* v. *Howden* (1863), 14 C. B. (N.S.) 398.

(*e*) *Thompson* v. *Hickman*, [1907] 1 Ch. 550.

(*f*) [1894] 2 Ch. 11; see also *Mappin Bros.* v. *Liberty & Co.*, [1903] 1 Ch. 118.

(*g*) Conveyancing Act, 1881, s. 6.

(*h*) *Birmingham, Dudley and District Banking Co.* v. *Ross* (1888), 38 Ch. D., at p. 308.

(*i*) *Broomfield* v. *Williams*, [1897] 1 Ch. 602.

he has not contracted to sell (*k*). A careful conveyancer should always consider this point when the purchaser's draft is submitted to him for approval on behalf of the vendor (*l*).

A right unknown to the law cannot pass by implied grant or under the general words of the Conveyancing Act; but the general words of the Act are not confined to easements already in existence, and it is a question not of title to use but of fact of user (*m*). Consequently all the circumstances existing at the date of the conveyance must be considered.

Evidence will not be received after the execution of the conveyance to show that property, which would primâ facie pass under the general words, was not intended to be included in the purchase (*n*). A man cannot derogate from his own grant, and therefore if the vendor expressly or impliedly grants a right to light or any other easement over the adjoining land, he cannot afterwards interfere with enjoyment of this easement by the grantee. But the court will not *imply* a grant if the vendor had no power at the time of the conveyance to make one, *e.g.*, if the adjoining land did not belong to him. Nor can general words be read into the deed by virtue of the Conveyancing Act so as to import an express grant in a case where the vendor had *no power* to make one (*o*). On the other hand, if the vendor purport *expressly* to grant

(*k*) *Re Peck and School Board for London's Contract*, [1893] 2 Ch. 315; *Re Hughes and Ashley's Contract*, [1900] 2 Ch. 595.

(*l*) *Bolton* v. *Bolton* (1879), 11 Ch. D., at p. 969.

(*m*) *International Tea Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165.

(*n*) *Doe* d. *Norton* v. *Webster* (1840), 4 P. & D. 270.

(*o*) *Quicke* v. *Chapman*, [1903] 1 Ch. 659.

an easement which he has no power to grant, he will be estopped from disputing right to do so, and if he afterwards acquires the adjoining land the interest feeds the estoppel (p).

For the convenience of the reader, the first three sub-sections of s. 6 of the Conveyancing Act, 1881, are given *in extenso*:

"(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures (q), commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with (r), or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

"(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

"(3) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view

(p) *Glave* v. *Harding* (1858), 27 L. J. Ex. 291.

(q) *Cf. Re Brooke*, [1894] 2 Ch. 600; *Small* v. *National Provincial Bank*, [1894] 1 Ch. 686.

(r) As to what passes under these words, see *Kay* v. *Oxley* (1875), L. R. 10 Q. B. 360.

of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rents-charge, rents-seck, rents of assize, fee-farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof."

All the Estate Clause.—The "all the estate" clause which formerly followed the "general words" is now rendered unnecessary by s. 63 of the Conveyancing Act, 1881, which enacts with regard to conveyances made after December 31st, 1881, that every conveyance shall "be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

"This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained" (*s*).

The general rule may be taken to be that when a person, having several estates and interests in a denomination of land, joins in conveying all his estate and interest in the lands to a purchaser, every estate and interest vested in him will pass by that conveyance, although not vested in him in the character in which he became a party to the conveyance (*t*).

(*s*) See *Williams* v. *Pinckney* (1897), 66 L. J. Ch. 551.

(*t*) *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch., at p. 256.

Reservations.—After the parcels the vendor should insert such reservations (if any) as by the terms of the contract he is entitled to make. The general rule is that a man cannot derogate from his own grant, and consequently if the grantor intends to reserve any right over the tenement granted, such, for instance, as a right of way, an easement of light, or other easement, it is his duty to reserve it expressly in the grant (*u*). Strictly speaking, the reservation of an easement operates as a new grant by the grantee to the grantor, and, therefore, unless the purchaser executes the conveyance there is merely an equitable right and not a legal easement (*x*). If, however, the vendor conveys to a feoffee to uses to the use that the vendor shall enjoy the easement and subject thereto to the use of the purchaser (*y*), it is clear that the purchaser's execution would not be necessary. The reservation of an easement is never *implied* except in the case of an easement of necessity. If a landowner sells the surface reserving to himself the minerals with power to get them, this will not entitle him to get the minerals in such a way as to destroy the surface, unless the reservation is framed in such a way as to show clearly that he is entitled to have that power (*z*). If the reservation is void for uncertainty or perpetuity, the grant is operative and the exception fails (*a*).

(*u*) *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31.

(*x*) *May* v. *Bellville*, [1905] 2 Ch. 605.

(*y*) Conveyancing Act, 1881, s. 62.

(*z*) *Hext* v. *Gill* (1872), L. R. 7 Ch. 699.

(*a*) *Savill Brothers, Limited* v. *Bethell*, [1902] 2 Ch. 523.

SECTION 7.

THE HABENDUM.

Words of Limitation.—The habendum determines and ascertains the estate or interest limited by the deed, though this, as we have before seen, is frequently done by the grant in the premises, in which case the habendum may lessen, enlarge, explain or qualify, but may not contradict or be repugnant to, the estate granted in the testatum (*b*). Care must be taken to insert proper words of limitation in the habendum, although it is sufficient if the limitation appears in the testatum. By the common law in order to convey an estate in fee simple it is necessary to limit the property to the purchaser and his *heirs*. Thus, if freeholds are conveyed to A., his executors, administrators, and assigns, or to A. *simpliciter*, nothing more than a life estate passes (*c*), and it is immaterial whether the estate in fee intended to be assured is legal or equitable (*d*). It is now provided by the Conveyancing Act, 1881, s. 51, that in a deed executed after the Act it shall be sufficient in the limitation of an estate in fee simple to use the words "*in fee simple*" without the word "heirs," and on the limitation of an estate tail to use the words "in tail" without the words "heirs of the body," and on the limitation of

(*b*) Shep. Touch. 76; *Goodtitle* v. *Gibbs* (1826), 5 B. & C. 709.

(*c*) *Re Bird's Trusts* (1876), 3 Ch. D. 214; *Re Irwin*, [1904] 2 Ch. 753; *Re Monckton's Settlement*, [1913] 2 Ch. 636.

(*d*) *Re Whiston's Settlement*, [1894] 1 Ch. 661; *Re Irwin*, [1904] 2 Ch. 753; *Re Monckton's Settlement*, [1913] 2 Ch. 636; but as to a limitation to beneficiaries in a settlement, see *Re Tringham*, [1904] 2 Ch. 487; and *Re Oliver*, [1905] 1 Ch. 191, explained in *Re Thursby*, [1910] 2 Ch. 181.

an estate in tail male or in tail female, to use the words "in tail male" or "in tail female," as the case requires, without the words "heirs male of the body" or "heirs female of the body." But it remains the law that however plain the intention of the parties may be to pass the legal estate in fee simple, the absence of the word "heirs" can only be compensated for by the use of the words "in fee simple" prescribed by the Act, and a habendum to the grantee "in fee" is nugatory (e).

Qualifications of Grantee's Estate.—If the conditions stipulate that the property is sold and *will be conveyed*, subject to all existing easements, the vendor is entitled to have a saving clause in general terms inserted in the habendum (f). If the contract states that the property is sold subject to certain restrictive covenants, the purchaser is entitled to a conveyance subject only to the restrictive covenants mentioned in the contract, although he has notice of others (g). His liability, however, under the covenants depends, as we shall see, not on their inclusion in the conveyance, but on his notice of their existence. Where the property is sold subject to a lease or an incumbrance, the habendum should be expressed to be subject to the same, otherwise a vendor conveying as beneficial owner would be liable under the implied

(e) *Re Ethel and Mitchell and Butler's Contract*, [1901] 1 Ch. 945.

(f) *Gale* v. *Squier* (1877), 5 Ch. D. 625.

(g) *Re Wallis and Barnard's Contract*, [1899] 2 Ch. 515, and *quære* whether the purchaser could enforce specific performance on this footing.

covenant for title if the lease or incumbrance was created by him or by a predecessor in title through whom he derives title otherwise than by purchase for value (*h*). But a conveyance expressed to be subject to a lease does not estop the purchaser from subsequently disputing the validity of the lease (*i*).

SECTION 8.

COVENANTS FOR TITLE.

Implied Covenants for Title.—After the habendum follow the covenants for title, if it is desired to insert any express covenants, but it is usual since the Conveyancing Act, 1881, to rely upon the covenants for title implied by that Act (*k*).

No covenant is implied by the Act unless the vendor conveys and is expressed to convey as *beneficial owner*, or as *settlor*, or as *trustee*, or as *mortgagee*, or as *personal representative* of a deceased person, or as *committee* of a lunatic so found by inquisition, or *under an order of the court*, or by the direction of a person as beneficial owner (*l*).

The effect of a conveyance as beneficial owner in the case of a sale is provided for by clauses (a) and (b) of s. 7 (1), and in the case of a mortgage by clauses (c) and (d). The effect of conveying as settlor is provided for by clause (e) of the same sub-section, and

(*h*) *David* v. *Sabin*, [1893] 1 Ch. 523.

(*i*) *Smith* v. *Widlake* (1877), 3 C. P. D. 10.

(*k*) 44 & 45 Vict. c. 41, s. 7.

(*l*) *Ibid.*, s. 7 (4).

clause (f) deals with the remaining cases of conveyances by trustees, mortgagees, etc. Where a conveyance is made by the direction of some person who is expressed to direct as beneficial owner, as in the case of a conveyance by trustees by the direction of the tenant for life, the person giving the direction is deemed to convey as beneficial owner (*m*).

Beneficial Owner.—In the case of a sale of freehold property by a vendor who is expressed to convey as beneficial owner, there are four covenants implied, viz., for right to convey for quiet enjoyment, for freedom from incumbrances, and for further assurance. The covenants are all qualified, and only apply to (1) the acts and omissions of the vendor himself; (2) the acts and omissions of persons through which he claims otherwise than by *purchase for value*, which expression does not include a conveyance in consideration of marriage; (3) the acts and omissions of persons claiming through him; and (4) the acts and omissions of persons claiming in trust for him (*n*).

In the case of a sale of leaseholds, in addition to the four covenants which have just been enumerated, there is a covenant implied that the lease is valid and subsisting, but this is qualified, like the others.

Settlor.—In a conveyance by way of settlement in which a person is expressed to convey as settlor there is implied a covenant for further assurance which is limited to the person so conveying and persons deriving title under him. A covenant for further

(*m*) 44 & 45 Vict. c. 41, s. 7 (2).
(*n*) *David* v. *Sabin*, [1893] 1 Ch., at p. 532.

assurance imports relief from incumbrances in the case of a conveyance for value, but this is not the case when the conveyance is voluntary (*o*).

Trustee, Mortgagee, Personal Representative, etc.—Where the vendor is expressed to convey as trustee, mortgagee, personal representative, committee of a lunatic so found by inquisition, or under an order of the court, the only covenant implied is against incumbrances, and this is limited to the acts or omissions of the vendor, and to acts or omissions to which the vendor has been "party or privy."

In construing the words "party or privy" in another Act, LINDLEY, L.J., said (*p*) : "One person may be and often is liable in law for frauds which he has not committed; but to say that he is *party* or *privy* to them is quite another matter, and is only true when he has personally in some way participated in them."

Covenants for Title in Special Cases.—It must be borne in mind that the covenants implied by the Act may be varied or extended by the deed (*q*), and it is desirable to introduce a modification in the case of a sale by a tenant for life, or by joint owners, or tenants in common.

In the case of a tenant for life, a proviso is usually inserted that as respects the reversion or remainder expectant on the life estate, the covenants for title

(*o*) *Re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461, and cases there cited.

(*p*) *Thorne* v. *Heard*, [1894] 1 Ch., at p. 606.

(*q*) S. 7 (7).

shall not extend to the acts, deeds or defaults of persons other than the tenant for life and his heirs and persons claiming under or in trust for him (*r*). It has, however, been doubted by COZENS-HARDY, J., whether this restriction has any force whatever in the case of a sale by a tenant for life under the Settled Land Acts (*s*).

In the absence of special agreement the purchaser is entitled to a joint and several covenant as to the entirety by tenants in common. In the case of a conveyance by a husband and wife, as, for instance, under the Fines and Recoveries Act, it is provided (*t*) that "where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section (seven), the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife."

As we have already seen, if a trustee conveys by the direction of the tenant for life, the latter must covenant for title by directing as beneficial owner (*u*).

If the vendor does not intend that his covenants for title shall extend to defects disclosed to the

(*r*) See Dart, Vendors and Purchasers, 7th ed., 571.

(*s*) *Re Tyrell* (1900), 82 L. T. 675.

(*t*) Conveyancing Act, 1881, s. 7 (3).

(*u*) *Ante*, p. 324.

purchaser, *whether on the face of the deed or aliunde*, he must take care either to frame his covenant so as in terms to exclude such defects, or he must insert some clause in the deed clearly explaining and controlling his covenants (*x*). The generality of the covenant for title cannot be restricted by proving that a defect was known to the purchaser, *e.g.*, by showing that the purchaser knew that the plan to the conveyance was continued beyond the true boundary of the property (*y*).

SECTION 9.

COVENANTS OTHER THAN COVENANTS FOR TITLE.

Embodying Covenants in Conveyance.—After the habendum in a modern conveyance follow the covenants (if any) which are to be entered into by the vendor or purchaser. The cases are somewhat conflicting as to how far the stipulations of the contract of sale are merged in the conveyance. On the one hand, it is said that where there is a preliminary contract which is afterwards reduced into a deed, the rights of the parties are governed exclusively by the deed (*z*). On the other hand, it is said that the conveyance is only conclusive in respect of matters to be done prior to the conveyance (*a*). It would seem to be a question

(*x*) *Page* v. *Midland Rail. Co.*, [1894] 1 Ch. 20.

(*y*) *May* v. *Platt*, [1900] 1 Ch. 621. See, however, *Stait* v. *Fenner*, [1912] 2 Ch. 504, and *Fenner* v. *McNab* (1912), 107 L. T. 14, where the conveyance was rectified so as to restrict the generality of the covenants for title, that being in accordance with the contract.

(*z*) *Greswolde-Williams* v. *Barneby* (1901), 83 L. T. 708.

(*a*) *Saunders* v. *Cockrill* (1902), 87 L. T. 30. See also *Stait* v. *Fenner*, [1912] 2 Ch. 504, where the covenants for title in the conveyance were rectified so as to accord with the contract.

of fact in each case whether the parties intended the deed to cover the whole or only a portion of the ground covered by the contract (*b*). However this may be, it is clear that the parties are entitled to insert in the conveyance all stipulations of the contract which have not been performed prior to completion (*c*).

The Burden of Covenants.—For the purpose of discussing the burden of covenants it is necessary to divide covenants into two classes, viz. affirmative and negative.

I.—The burden of an *affirmative* covenant, *i.e.*, a covenant compelling a man to lay out money or do any other act of an active character, does not run with the land at common law, except as between landlord and tenant, and is not enforced by courts of equity, as against an assignee.

The principle appears to be that an affirmative covenant, which is not entered into with reference to the subject-matter of a lease (*d*), is either personal to the covenantor or gives an executory interest in land arising *in futuro*, which is obnoxious to the rule against perpetuities (*e*). Consequently the purchaser of real estate with notice of an affirmative covenant entered into by the vendor or his predecessors in

(*b*) *Palmer* v. *Johnson* (1884), 13 Q. B. D. 357—359.

(*c*) *Re Cooper and Crondace's Contract* (1904), 90 L. T. 258.

(*d*) As between landlord and tenant a covenant runs with the land at common law and with the reversion by statute. 32 Hen. 8, c. 34; Conveyancing Act, 1881, ss. 10, 11, and 12; Conveyancing Act, 1911, s. 2.

(*e*) Perpetuity has no application to a covenant which runs with the land, since such a covenant *in its inception* binds the land.

title is not bound thereby, except in the case of the purchase of a reversion subject to a lease containing affirmative covenants by the lessor.

It must, however, be remembered that a covenant although affirmative in form may be negative in substance (*f*), and where it is partly affirmative and partly negative, the court will, in a proper case, enforce the negative part of the covenant (*g*).

II.—A *negative*, or, as it is usually called, a *restrictive*, covenant probably did not run with the land at common law as between owners in fee simple. The courts of equity, however, restrained any one who took property *with notice* of a restrictive covenant from using it in a way inconsistent with the covenant (*h*). Since the Judicature Act the rules of equity prevail, and recent decisions have established that a restrictive covenant runs with the land in equity and is an equitable burden on the land analogous to a negative easement. In order to escape the burden of a restrictive covenant an assignee of the property must establish three things, viz., (1) that he is a purchaser for value; (2) that he has acquired the legal estate; and (3) that he purchased without notice, actual or constructive, of the existence of the covenant. If the purchaser took only an equitable estate, he took subject to the burden whether he had notice or not (*i*); while an alienee who acquires the

(*f*) *Tulk* v. *Moxhay* (1848), 2 Ph. 774 (as explained by COTTON, L.J., in *Haywood* v. *Brunswick Building Society* (1881), 8 Q. B. D. 409); *Catt* v. *Tourle* (1869), L. R. 4 Ch. 654.

(*g*) *Clegg* v. *Hands* (1890), 44 Ch. D. 503.

(*h*) *Tulk* v. *Moxhay*, *supra*.

(*i*) *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D.. at p. 583.

legal estate without notice, is also bound if he is not a purchaser for value (*k*). A lessee is, *pro tanto*, a purchaser for value, but he is, as a rule, bound by the restriction because he is affected with constructive notice of the title of his lessor.

With regard to covenants made after December 31st, 1881, if a contrary intention is not expressed, the covenant, though not expressed to bind heirs, "shall operate in law to bind the heirs and real estate" (*l*). But if it is intended that the burden shall run with the land, the *assigns* of the covenantor should be mentioned, and also the land to be burdened; for a covenant which is personal and collateral does not run with the land in equity, and therefore the burden cannot be enforced against an assign of the purchaser (*m*).

Certain public bodies, such as a school board purchasing for the purposes of the Elementary Education Act, 1870, are not bound by restrictive covenants, even though they buy with notice of them (*n*); but unless compensation has been paid to the covenantee, the restriction is not extinguished, and revives on a resale (*o*).

A restrictive covenant is not obnoxious to the Rule against Perpetuities (*p*).

(*k*) *E.g.*, a trespasser who has acquired a statutory title (*Re Nisbet and Pott's Contract*, [1906] 1 Ch. 386).

(*l*) Conveyancing Act, 1881, s. 59.

(*m*) *Formby* v. *Barker*, [1903] 2 Ch. 551; *Brigg* v. *Thornton*, [1904] 1 Ch. 386; *Re Fawcett and Holmes* (1889), 42 Ch. D. 150.

(*n*) *Kirby* v. *School Board for Harrogate*, [1896] 1 Ch. 437.

(*o*) *Ellis* v. *Rogers* (1885), 29 Ch. D., at pp. 665, 666; *Bird* v. *Eggleton* (1885), 29 Ch. D. 1012.

(*p*) *Mackenzie* v. *Childers* (1889), 43 Ch. D. 265.

The Benefit of Covenants.—The benefit of a covenant runs with the land where the covenant is one which relates to or touches and concerns the land of the covenantee, and there is nothing in the nature of the transaction to show that this was not the intention of the parties (*q*). A covenant which fulfils these conditions may be enforced by persons having privity of estate with the original covenantee (*r*). By s. 58 of the Conveyancing Act, 1881, it is enacted, with regard to covenants made after December 31st, 1881, that "A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed." Independently, however, of this enactment, it is not necessary that assigns should be expressly mentioned in the covenant in order that it should extend to the assigns of the covenantee (*s*).

Assignment of Benefit.—It does not follow that every person having the same estate as the covenantee can enforce the covenant. Thus, in general, the purchaser of a portion only of the covenantee's property cannot enforce the covenant where the rights under the covenant have not been expressly assigned (*t*).

The benefit of a restrictive covenant may pass to persons other than the original covenantees—(1) by

(*q*) *Spencer's Case* (1583), 5 Co. 16; *Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 776.

(*r*) Dart, Vendors and Purchasers, 7th ed., 785.

(*s*) *Ibid.*

(*t*) *Renals* v. *Cowlishaw* (1878), 9 Ch. D. 125; 11 Ch. D. 866; *Everett* v. *Remington*, [1892] 3 Ch. 148.

express assignment; (2) where the benefit is annexed to a particular piece of land; and (3) where it is entered into as part of a general building scheme.

(1) The benefit of a restrictive covenant may, of course, be expressly assigned if it is not personal and collateral. If the vendor sells the whole of his estate, a restrictive covenant entered into by the purchaser, although enforceable by the original covenantee (the vendor), cannot be enforced by his executors (*u*). It seems to follow that the benefit of such a covenant is not assignable, or at any rate that the assignment would only be effectual during the vendor's lifetime.

(2) The covenant may be so framed that it enures to the benefit of the owners for the time being of some specific adjacent property. When the benefit of a covenant is once *clearly annexed* to one piece of land, there is a presumption that it passes by an assignment of that land, and it may be said to run with the land in equity as well as at law without proof of special bargain or representation on the assignment of the land (*x*).

(3) Where there are interdependent covenants entered into as part of a general building scheme, the several purchasers may enforce the covenants *inter se*, and the right enures to the assigns of the original purchasers (*y*). This right does not arise when it is clear that the covenants were intended exclusively for the benefit of the vendor (*z*). The whole theory of

(*u*) *Formby* v. *Barker*, [1903] 2 Ch. 539.

(*x*) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388.

(*y*) *Renals* v. *Cowlishaw* (1878), 9 Ch. D., at p. 129.

(*z*) *Keates* v. *Lyon* (1869), L. R. 4 Ch. 218; *Osborne* v. *Bradley*, [1903] 2 Ch. 446.

these interdependent covenants appears to point to an arrangement *made once for all* either on a sale by auction by conditions of sale stating the covenants, and that other persons will enter into similar covenants, and a plan exhibited at the sale (*a*); or by a scheme entered into already by antecedent sales, or by some antecedent arrangement (*b*), the particulars of which are stated to the purchaser, and which are displayed upon a plan drawn upon the purchaser's deed (*c*).

If the existence of a general building scheme can be established, the fact that the plaintiff has committed trivial breaches will not disentitle him to an injunction (*d*). Where an estate is sold at successive sales, a purchaser can only enforce the stipulations against property shown as lotted in the plan, and subject to the stipulations at the sale at which he purchases (*e*).

How Lost.—The right to enforce a covenant of this kind may be lost by delay and acquiescence (*f*). It is a mistake, however, to suppose that if a restrictive covenant is not enforced in all cases, it cannot be enforced in any. If the character of the land has been so substantially changed that the objects of the covenants which are part of a building scheme can no

(*a*) See *Rowell* v. *Satchell*, [1903] 2 Ch. 212; *Nalder and Collyer's Brewery Co., Limited* v. *Harman* (1900), 82 L. T. 594; *Elliston* v. *Reacher*, [1908] 2 Ch. 665; *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, and cases cited *ante*, p. 346.

(*b*) *Cf. Spicer* v. *Martin* (1888), 14 App. Cas. 12.

(*c*) *Osborne* v. *Bradley*, [1903] 2 Ch., at p. 454.

(*d*) *Hooper* v. *Bromet* (1903), 89 L. T. 37.

(*e*) *Rowell* v. *Satchell*, [1903] 2 Ch. 212.

(*f*) *Sayers* v. *Collyer* (1884), 28 Ch. D. 103; *Roper* v. *Williams* (1822), Turn. & R. 18; *Hepworth* v. *Pickles*, [1900] 1 Ch. 108.

longer be attained, the court will refuse to enforce them (*g*). But the fact that in a few instances the covenants have been relaxed does not destroy the benefit of the covenants as to the rest of the estate (*h*). Moreover, where no building scheme is proved to exist, and there is no evidence that the covenant was entered into for the protection of any particular estate, the change in the character of the neighbourhood, although caused by the acts of the grantor, will not disentitle him to an injunction (*i*).

Covenants of Indemnity.—Even in the absence of any express stipulation in the contract of sale, the purchaser is bound to give certain covenants of indemnity to the vendor. Thus, on the sale of leaseholds, the purchaser must enter into a covenant to observe and perform the covenants contained in the lease and to indemnify the vendor against the same (*k*). In one case it was held, on an assignment by *trustees*, that the indemnity applied to past breaches committed prior to the sale (*l*); but it is conceived that this would not be so where the vendor conveys as beneficial owner (*m*). So also on the sale of an equity of redemption the purchaser must covenant to indemnify the vendor against the mortgage debt and

(*g*) *Duke of Bedford* v. *Trustees of British Museum* (1822), 2 My. & K. 552; *Peek* v. *Matthews* (1867), L. R. 3 Eq. 515.

(*h*) *German* v. *Chapman* (1877), 7 Ch. D. 271; *Knight* v. *Simmonds*, [1896] 2 Ch. 294.

(*i*) *Osborne* v. *Bradley*, [1903] 2 Ch. 446.

(*k*) Dart, Vendors and Purchasers, 7th ed., 580; *cf.* Land Transfer Rules, 1903, rr. 133, 138.

(*l*) *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148.

(*m*) Williams, Vendor and Purchaser, Vol. I., 592

interest (*n*). The same principle applies to the sal of freeholds subject to restrictive covenants; but i has been recently decided by the Court of Appeal (*o* that the purchaser is entitled to preface his covenan to observe and perform with the words "with th object and intention of affording to the vendor a ful and sufficient indemnity in respect of the restrictiv covenants, *but not further or otherwise.*"

SECTION 10.

ASSURANCES OF COPYHOLDS.

Documents required.—When the estate sold is o copyhold tenure, if the vendor is beneficially interested the surrender to the purchaser is usually accompanied by a deed of covenant to surrender by which the ordinary covenants for title may be incorporated (*p*).

If the vendor is a trustee for sale under a will containing a power to appoint to a purchaser, with or without a devise to the trustee subject to such power, the trustee can convey by way of bargain and sale, and a double admittance with the consequent fines be thus avoided (*q*); but if there is a devise to trustees, the lord can require them to be admitted, and they cannot avoid the fees consequent thereon by calling upon the lord to admit an infant heir (*r*), though he cannot in such a case seize *quousque* for want of a

(*n*) *Bridgman* v. *Daw* (1892), 40 W. R. 253.

(*o*) *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173.

(*p*) Williams, Vendor and Purchaser, Vol. I., 586, 587.

(*q*) *Glass* v. *Richardson* (1852), 2 De G. M. & G. 658; *R.* v. *Wilson* (1863), 9 Jur. (N.S.) 439.

(*r*) *R.* v. *Garland* (1870), L. R. 5 Q. B. 269.

tenant, and the estate will remain in the customary heir until the devisee is admitted (*s*).

The surrender may be made either in or out of court. If made in court it is entered on the court rolls of the manor, and a copy of the entry, signed by the steward, and stamped, is delivered to the purchaser. If the surrender is made out of court, the document evidencing the surrender is signed by the parties and the steward, and stamped, and entered upon the court rolls (*t*).

An *equitable* interest in copyholds is not the subject of a surrender except for the purpose of barring an estate tail. Equitable interests are usually conveyed by deed of assignment (*u*).

The entry on the court rolls and the memorandum of surrender are usually prepared by the steward of the manor (*v*).

Until admittance the surrenderor remains tenant to the lord, and the person to whose use the surrender is made acquires merely a right to be admitted (*x*), which right may be exercised at any time, though it is usually done immediately; but whenever the admittance is taken it will relate back to the surrender (*y*), and on such admittance the surrenderee

(*s*) *Garland* v. *Mead* (1871), L. R. 6 Q. B. 441.

(*t*) Copyhold Act, 1894, s. 85.

(*u*) Scriven, Copyholds, 116; Elton, Copyholds, 93.

(*v*) Prideaux Prec., Vol. I., 21st ed., 329, 331; Williams, Real Property, 20th ed., 473.

(*x*) *Doe* d. *Tofield* v. *Tofield* (1809), 11 East, 246; *Doe* d. *Winder* v. *Lawes* (1837), 7 Ad. & E. 195; *Rex* v. *Dame Jane St. John Mildmay* (1833), 5 B. & Ad. 254.

(*y*) 1 Watk. Cop. 103.

becomes tenant to the lord, to whom he must pay the customary fine for his admittance.

The lord of the manor is entitled to a fine in respect only of a transmission of the legal estate in copyholds, and cannot claim a fine in respect of any devolution of the equitable estate where the legal estate remains in the person who has been already admitted tenant on the rolls (z). A covenant to surrender, though binding as between surrenderor and surrenderee, cannot be enforced by the lord so as to entitle him to compel a new admittance and a fine in respect thereof (a).

The fine paid to the lord is either certain or arbitrary; but if arbitrary is restrained to two years' improved value of the land, after deducting quit-rents (b).

The admittance of one joint tenant or one coparcener is the admission of their companions, and one fine only on their admission is therefore payable (c), and in the absence of special custom the steward is entitled to one fee only (d). It has been held that if copyholds are devised to three trustees, who are also executors and have proved the will, two of the trustees can disclaim the copyhold devise, and compel the lord to admit the remaining trustee as sole tenant (e). These decisions are quite inconsistent

(z) *Rex* v. *The Lord of the Manor of Hendon* (1788), 2 T. R. 484.

(a) *Hall* v. *Bromley* (1887), 35 Ch. D. 642.

(b) 1 Watk. Cop. 308.

(c) Scriv. Cop. 347.

(d) *Traherne* v. *Gardner* (1856), 5 El. & Bl. 913.

(e) *Wellesley* v. *Withers* (1855), 4 El. & Bl. 750; *Bence* v. *Gilpin* (1868), L. R. 3 Ex. 76.

with the usually accepted doctrine that an executor who is also trustee cannot disclaim the real estate after accepting the office of executor (*f*). Tenants in common must, however, be admitted severally, and pay a fine in respect of the share to which they are admitted, and on their death, as also on the death of a coparcener, the representatives must be admitted and pay several fines in respect of their admissions (*g*).

Where copyholds are limited in remainder subject to any particular estate, the admission of the tenant of the particular estate is the admission of those in remainder, and one fine only is payable, which fine should be apportioned between the tenant of the particular estate and the remainderman, and should be paid by the latter on his coming into possession (*h*); but if a special custom exists by which a fine is payable by the remainderman on coming into possession, he should be admitted (*i*). If copyholds are sold by an equitable tenant for life under the Settled Land Acts the lord can only claim one fine although the trustees have not been admitted (*k*).

On an estate falling into the possession of a reversioner he may enter without re-admission or payment of a fine, but the heir of the reversioner must be admitted and pay a fine, and the same rule applies in the case of the heir of a remainderman, and such heir may surrender before admittance (*l*), though

(*f*) Lewin, Trusts, 217. (*g*) 1 Watk. Cop. 82.

(*h*) Scriv. Cop. 294.

(*i*) *Doe* d. *Whitbread* v. *Jenney* (1804), 5 East, 522; 1 Watk. Cop. 36.

(*k*) *Re Naylor and Spendla's Contract* (1886), 34 Ch. D. 217.

(*l*) *Reg.* v. *The Lady of the Manor of Dullingham* (1838), 8 Ad. & El. 885; *Evelyn* v. *Worsfold* (1849), 15 L. T. (o.s.) 4.

a surrender by a surrenderee before his admittance is void (*m*).

Neither the Statute *De Donis* (*n*) nor the Statute of Uses (*o*) extend to copyhold estates, and the lord of a manor is not bound to receive a surrender of copyholds by a deed burdened with trusts or to such trusts as the surrenderee shall appoint, and in default of appointment to the use of the surrenderee, his heirs and assigns (*p*).

SECTION 11.

ASSURANCES OF REGISTERED LAND.

Registration of Transfer.—If the property sold is already on the register, *i.e.*, if the title thereto has been registered under the Land Transfer Acts, 1875 to 1897, the conveyance should be effected or perfected by a transfer in the forms provided in the First Schedule to the Land Transfer Rules, 1903, with such alterations and additions (if any) as are necessary or desired and the registrar allows (*q*).

Instruments for which no form is provided, or to which the scheduled forms cannot conveniently be adapted, must be in such form as the registrar shall direct or allow, the scheduled forms being followed as nearly as circumstances will permit (*r*).

The forms provided by Land Transfer Rules are as follows:

(*m*) 1 Watk. Cop. 81.
(*n*) 13 Edw. 1, c. 1.
(*o*) 27 Hen. 8, c. 19.
(*p*) *Flack* v. *Downing College* (1853), 13 C. B. 945.
(*q*) See rr. 97, 126, 127.
(*r*) Rule 98.

FORM 20.—INSTRUMENT OF TRANSFER OF THE WHOLE OF THE LAND COMPRISED IN A TITLE.

Land Registry.

(*Land Transfer Acts*, 1875 *and* 1897.)

District
Parish
No. of Title
Date

In consideration of pounds (£), I, A. B., of, etc., hereby transfer to C. D., of, etc., the land comprised in the title above referred to.

Signed, sealed, and delivered by the said A. B., in the presence of E. F., of, etc.

Signature of A. B.
Seal.

When the consideration is advanced by different persons in separate sums, or does not consist or wholly consist of money, its nature or the separate payments made may be concisely stated. When the transfer is to two or more jointly, no addition need be made to the form. Where it is to two or more as tenants in common, one of the following forms may be used: "To C. D. and E. F. in equal shares"; "To C. D. four-fifths, and to E. F. one-fifth of," and so on. Where the transferor retains a share, add the words, "and I, the said A. B., retain share or shares."

The amount of the consideration should be stated in words, and repeated in figures, as, for instance, "three hundred and seventy pounds (£370)."

FORM 21.—INSTRUMENT OF TRANSFER OF PART OF THE LAND COMPRISED IN A TITLE.

As Form 20, adding after "the land" these words: "shown and edged with red on the accompanying plan and known as (and—*if it is desired that a particular verbal description be entered on the register*—described in the schedule hereto), being part of the land comprised in the title above referred to."

Add schedule, if any.

To be executed as Form 20 by the transferor.

The plan must be signed by the transferor, and by or on behalf of the transferee.

FORM 34.—INSTRUMENT OF TRANSFER OF LAND IN EXERCISE OF A POWER OF SALE CONTAINED IN A REGISTERED CHARGE (RULE 137).

As Form 20, adding after "(£)" the words, "and in exercise of the power of sale conferred by the charge dated, etc., and registered, etc.," and at the end, "discharged from the said charge."

FORM 35.—INSTRUMENT OF TRANSFER OF LEASEHOLD LAND.

As Form 20, adding at the end, "for the residue of the term granted by the registered lease."

Where it is intended to negative the covenants implied by s. 39 of the Act of 1875 or Rule 139, the following words may be added to the form: "The covenant by the transferor (*or* transferee *or* the covenants by the transferor and transferee) implied by s. 39 of the Act of 1875 (*or* Rule 39), is (*or* are) not to be implied."

For the purpose of introducing the implied covenants for title under the Conveyancing Act, 1881, a person may in a registered disposition be expressed to execute, transfer, or charge as beneficial owner, settlor, as trustee, as mortgagee, as personal representative of a deceased person, as committee of a lunatic so found by inquisition or under an order of the court; and an instrument of transfer may be worded accordingly, but no reference to such implied covenants can be entered on the register (*s*).

However, a vendor of land registered with an absolute title cannot be required to enter into any covenant for title, and a vendor of land registered with a possessory or qualified title can only be required to covenant against estates and interests excluded from the effect of registration, and the implied covenants under the Conveyancing Act must be construed accordingly (*t*). Subject to this provision the purchaser should always incorporate the appropriate statutory covenants in the form of transfer.

It is also desirable to amend the statutory form by inserting a receipt for the consideration money, since otherwise the purchaser will not be justified in paying the money to the vendor's solicitor unless the latter can produce an express authority from the vendor for him to receive it.

The transfer must be executed as a deed by the transferor in the presence of a witness who must attest the execution by signing his name and adding his address and description (*u*).

(*s*) Rule 99. (*t*) Act of 1897, s. 16 (3).

(*u*) Rules 107 to 109.

When executed and stamped with the proper Inland Revenue stamp the transfer must be taken or posted to the registry with the *ad valorem* registry fee stamps (*x*) affixed (or if sent by post with banker's draft, postal or post office order, cheque, or bank notes therefor), accompanied in either case by the vendor's land certificate (*y*).

The transfer is completed by the registrar entering on the register the transferee as proprietor of the land transferred. Upon completion of the transfer the registrar must, if required, deliver to the transferee a land certificate; he must also in cases where part only of the land is transferred, if required, deliver to the transferor a land certificate or return him the old certificate endorsed showing the land retained by him (*z*).

Effect of Registered Transfer.—By s. 30 of the Act of 1875 a transfer for valuable consideration of freehold land registered with an absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject: (1) to the incumbrances, if any, entered on the register; and (2) unless the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by the Act declared not to be incumbrances (*a*) but free from all other estates and interests whatsoever.

(*x*) See Fee Order of the 9th November, 1908.

(*y*) Rules 111 to 113, and s. 8 (1) of the Act of 1897.

(*z*) Act of 1875, s. 29.

(*a*) See Act of 1875, s. 18, and Act of 1897, Sched. I.

By s. 32 a transfer for valuable consideration of freehold land registered with a *possessory title*, when registered, has the same effect as the transfer of land registered with an absolute title, except that it does not affect or prejudice the enforcement of any right or interest *adverse to or in derogation of the title of the first registered proprietor*. It is not clear what meaning ought to be given to these words; but a comparison of the language of s. 7 (3) with that of s. 8 points to the conclusion that they do not include the rights of persons *claiming under* the first registered proprietor, *e.g.*, the equities of beneficiaries when the first proprietor was a trustee, unless a caution, inhibition, or restriction has been registered.

The liabilities, rights, and interests which are not deemed to be incumbrances, and to which the transfer is subject, include succession and estate duty, easements, rights to mines and minerals created previously to registration, manorial rights, leases under twenty-one years, and (at any rate in the case of possessory titles) any adverse claim in respect of length of possession of any other person in possession of the land when the registration of the first proprietor took place (*b*).

Legal Estate.—When the vendor is registered as proprietor with an absolute title, and there are no estates or interests to be assured to the purchaser which are among the things declared by the Act not to be incumbrances; and there are no other interests to be got in than registered incumbrances and charges, it appears to be unnecessary to supplement the transfer

(*b*) See Act of 1897, First Schedule and s. 12.

with the scheme of the Act it certainly has the desired effect of passing the legal estate (*h*).

Lands included in more than one title may be included in one disposition (*i*), and may be registered as to all or some or one only of the titles affected thereby (*k*).

(*h*) *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631.

(*i*) Rule 102.

(*k*) Rule 116.

CHAPTER XVIII.

SEARCHES FOR INCUMBRANCES.

SECTION 1.

LOCAL SEARCHES.

Middlesex and Yorkshire Registries.—If any part of the property is situated in Middlesex or in Yorkshire, search should be made in the registries established for those counties.

Under the Middlesex Registries Acts, 1708 and 1891 (*a*), unregistered conveyances (*b*) and wills are void against subsequent purchasers for value claiming under a registered deed (*c*). Wills registered *within six months* after the death of a testator who died in Great Britain, or registered *within three years* after the death of a testator dying elsewhere, have the same effect as if they were registered at the time of the testator's death (*d*). Where there is some unavoidable impediment to registration, and a memorial of the impediment has been entered within two years of the death of a testator dying in Great Britain, or within four years of the death of a testator dying elsewhere,

(*a*) 7 Anne, c. 20; 54 & 55 Vict. c. 64. The city of London is not within the county of Middlesex for the purposes of these Acts.

(*b*) There is no magical meaning in the word "conveyance." It denotes any instrument which carries from one person to another an interest in land. See *Credland* v. *Potter* (1875), L. R. 10 Ch. 8.

(*c*) Act of 1708 (7 Anne, c. 20), s. 1.

(*d*) *Ibid.*, s. 8.

then registration of the will is sufficient if made within six months after probate of the will or the removal of the impediment (*e*). After the lapse of five years from the testator's death, a registration will not be effectual against purchasers (*f*).

Under the Yorkshire Registries Act, 1884 (*g*), provisions are made for the registration of assurances, wills, and other instruments. The amending Act of 1885 (*h*) provides for the registration of a caveat in favour of a purchaser (*i*) which gives the purchaser the same priority as he would get from the registration of the assurance to him.

In Middlesex an unregistered document is binding upon a purchaser who buys with actual notice thereof, whether such notice is personal or through the purchaser's agent (*k*). In Yorkshire the priority given by registration is not to be altered except in the case of *actual fraud* (*l*), *e.g.*, where the person claiming under the subsequent registered document acted as confidential agent of persons interested under the prior unregistered document (*m*). A purchaser is not, however, bound to inquire about documents which are not registered and of which he has no notice (*n*).

Neither the Middlesex nor the Yorkshire Acts apply to copyholds, or to leases for not more than twenty-

(*e*) Act of 1708 (7 Anne, c. 20), s. 9.

(*f*) *Ibid.*, s. 10.

(*g*) 47 & 48 Vict. c. 54.

(*h*) 48 & 49 Vict. c. 26. (*i*) *Ibid.*, s. 3.

(*k*) *Le Neve* v. *Le Neve* (1748), Wh. & Tu., L. C. Eq., 8th ed., Vol. II., 187; *Re Weir* (1888), 58 L. T. 792.

(*l*) Act of 1884 (47 & 48 Vict. c. 54), s. 14.

(*m*) *Battison* v. *Hobson*, [1896] 2 Ch. 403.

(*n*) *Kettlewell* v. *Watson* (1884), 26 Ch. D. 501.

one years where possession goes with the lease (o); and the Middlesex Registry Acts do not apply to leases at a rack-rent.

In Middlesex a purchaser who obtains the legal estate will not be affected with notice of a registered equitable charge if he has neglected to search the register (p).

In Yorkshire, by s. 15 of the Yorkshire Act, 1884, registration was made notice to all the world, but this was found inconvenient and was repealed by the Act of 1885; by s. 16, however, no priority or protection is given or allowed to any estate or interest in land by reason or on the ground of such estate or interest being protected by or tacked to any legal or other estate or interest in such land (q). A purchaser who has searched the registry must examine the deeds of which memorials are registered (r).

Letters of administration and wills of leaseholds are never registered, and with regard to the wills of testators dying since January 1st, 1898, it is difficult to see any advantage to be derived from registration even in the case of freeholds.

An agreement for the sale of land cannot be registered (s), and no registration is required of a

(o) Middlesex Registry Act, 1708 (7 Anne, c. 20), s. 17; Yorkshire Registry Act, 1884 (47 & 48 Vict. c. 54), s. 28.

(p) *Morecock* v. *Dickins* (1768), Amb. 678.

(q) *Quære* whether the effect of the repeal of s. 15 is not nullified by the omission to repeal s. 16. See Elphinstone and Clark, Searches, 144. And see *Manks* v. *Whiteley*, [1912] 1 Ch. 735, where COZENS-HARDY, M.R., appears to have held that a purchaser who omits to search the register has constructive notice of a charge which is on the register, see at pp. 738 and 746.

(r) *Kettlewell* v. *Watson* (1884), 26 Ch. D. 501.

(s) *Rodger* v. *Harrison*, [1893] 1 Q. B. 161.

foreclosure decree (t), or of an adjudication in bankruptcy (u), but it would seem that the certificate appointing a trustee (under s. 54 (4) of the Bankruptcy Act, 1883) should be registered, and a deed of enfranchisement of copyholds must be registered (x).

Under the Yorkshire Acts a lien or charge, whether accompanied by a memorandum or not, must be registered (y), but this is not so in Middlesex, where there is no memorandum (z).

The Middlesex Registry Acts do not apply to any instrument made after July 30th, 1900, and capable of registration under the Land Charges Act, 1888 (a).

The Vendor and Purchaser Act, 1874 (b), provides that an assurance to a purchaser or mortgagee by a devisee claiming under a will not registered in Yorkshire or Middlesex, or by some one deriving title under such devisee, shall, if registered before, prevail over any assurance from the testator's heir-at-law.

What Search should be made.—When the property sold is situated in either Yorkshire or Middlesex, searches should be made against every person who is shown by the abstract to have been the owner of the property, or to have had power to dispose of it; but in practice the search is usually confined to the last purchaser or mortgagee and persons claiming under him.

(t) *Burrows* v. *Holley* (1887), 35 Ch. D. 123.
(u) *Re Calcott and Elvin's Contract*, [1898] 2 Ch. 460.
(x) *R.* v. *Registrar, etc., of Middlesex* (1888), 21 Q. B. D. 555.
(y) *Battison* v. *Hobson*, [1896] 2 Ch. 403.
(z) *Sumpter* v. *Cooper* (1831), 2 B. & Ad. 223.
(a) 63 & 64 Vict. c. 26, s. 4.
(b) 37 & 38 Vict. c. 78, s. 8.

Under the Yorkshire Registries Act, 1884 (c), and under Rule 14 of the Middlesex Registry Rules, 1892, an *Official Search* can be obtained which protects solicitors, trustees, or other persons in a fiduciary position, but is not apparently conclusive in favour of the purchaser.

SECTION 2.

JUDGMENTS AND WRITS AND ORDERS AFFECTING LAND.

When Judgments are a Charge.—By the Judgments Act, 1838, s. 19, judgments entered up against the owner of land do not affect a purchaser of the land unless registered in (now) the Central Office of the Supreme Court, and by the Judgments Act, 1839, s. 4, such a registration must be repeated every five years. By the Law of Property Amendment Act, 1860, s. 1, the judgment does not affect a purchaser unless a *writ or other due process of execution* has been *issued* and registered, and executed within three months of registration. By the Judgments Act, 1864, s. 1, judgments entered up since July 29th, 1864, do not affect land until the land has been *delivered in execution* by virtue of a writ of elegit or other lawful authority. If, however, land was actually delivered in execution, it was formerly unnecessary to register either the judgment or the writ of execution except for the purpose of obtaining a summary order for sale under s. 4 (*d*).

(*c*) 47 & 48 Vict. c. 54, ss. 20, 21, 23.
(*d*) *Re Pope* (1886), 17 Q. B. D. 743.

Now, however, under ss. 5 and 6 of the Land Charges, Registration and Searches Act, 1888 (*e*), as amended by s. 3 of the Land Charges Act, 1900 (*f*), every writ and order affecting land issued or made by any court for the purpose of enforcing a judgment, and any order appointing a receiver or sequestrator of land, whether obtained on behalf of the Crown or otherwise, and every delivery in execution or other proceeding taken in pursuance of any such writ or order or in obedience thereto, is void as against a purchaser for value unless registered at the Land Registry, and re-registered every five years.

By the Land Charges Act, 1900 (*f*), s. 2 (1), a judgment or recognizance whether obtained or entered into on behalf of the Crown or otherwise does not operate as a charge on land or on any interest in land or on the unpaid purchase money for any land unless or until a writ or order for the purpose of enforcing it is registered under s. 5 of the Land Charges, etc., Act, 1888, and by s. 5 the provisions of the Acts of 1838, 1839, 1860, and 1864, set out above are repealed.

What Search should be Made.—At the present time, therefore, it is only necessary to search at the *Land Registry* for writs and orders affecting land. The search should be against the last purchaser for value and persons claiming under him for five years next before completion. An *Official Search* can also be obtained in this case (*g*).

(*e*) 51 & 52 Vict. c. 51, s. 6.
(*f*) 63 & 64 Vict. c. 26.
(*g*) Land Charges, etc., Act, 1888, s. 17.

SECTION 3.

CROWN DEBTS.

When Crown Debts are a Charge.—By the Land Charges Act, 1900, s. 2, an inquisition finding a debt due to the Crown and any obligation or specialty made to the Crown, whatever may have been its date, does not now operate as a charge on land unless or until a writ or order for the purpose of enforcing it is registered under s. 5 of the Land Charges, etc., Act, 1888, at the Land Registry Office (*h*).

What Search should be Made.—The search at the Land Registry Office for writs and orders affecting land above-mentioned is therefore all that is required.

SECTION 4.

ANNUITIES.

Registration of Annuities. — Judgments Act, 1855 (*i*), ss. 12 and 14, provides that an annuity or rent-charge granted otherwise than by marriage settlement or will after April 26th, 1855, for a life or lives (*k*) shall not affect purchasers of land unless registered in (now) the Land Registry Office (*l*). But if a purchaser has notice of such an annuity or rent-charge at the time of completing his purchase it has been decided that he will be bound by it, though it is not registered (*m*).

(*h*) Land Charges Act, 1900, s. 2 (2).

(*i*) 18 & 19 Vict. c. 15, s. 12.

(*k*) A perpetual rent-charge does not appear to require registration.

(*l*) See Land Charges Act, 1900, s. 1.

(*m*) *Greaves* v. *Tofield* (1880), 14 Ch. D. 563.

What Search should be Made.—Search should be made against the last purchaser and persons claiming under him. As there is no provision for re-registration the search should be from the date at which the persons searched against acquired the property or attained twenty-one, whichever last happened.

An *Official Search* can be obtained.

SECTION 5.

LIS PENDENS.

Registration of Lis Pendens.—By the Judgments Act, 1839 (*n*), ss. 4 and 7, in the absence of express notice a purchaser is not bound by a *lis pendens*, unless it is registered and re-registered every five years in the Land Registry Office (*o*).

What Search should be Made.—Search, therefore, should be made in the Land Registry Office against the last purchaser, and persons claiming under him, for five years next before completion.

An *Official Search* can be obtained.

SECTION 6.

DEEDS OF ARRANGEMENT AND LAND CHARGES.

Registration of Deeds of Arrangements, etc.—The Land Charges, etc., Act, 1888 (*p*), requires the registration at the Land Registry Office of deeds of

(*n*) 2 & 3 Vict. c. 11.
(*o*) Land Charges Act, 1900, s. 1.
(*p*) 51 & 52 Vict. c. 51, ss. 7—14.

arrangement affecting land and statutory land charges as well as writs and orders affecting land, otherwise they will be void as against a purchaser for value. A deed of arrangement for the benefit of creditors *generally* must also be registered within seven clear days after execution in the Bill of Sale department of the Central Office under the Deeds of Arrangement Act, 1887 (*q*). But a deed of arrangement for the benefit of particular creditors (*r*), or intended primarily for the benefit of the debtor and his family (*s*), does not require registration at the Central Office. Registration of a deed of arrangement does not give validity to the instrument so as to preserve it from being set aside in bankruptcy proceedings (*t*), provided that such proceedings are instituted within three months after the execution of the deed (*u*).

What Search should be Made.—Deeds of arrangement and statutory land charges do not require re-registration, and it is therefore necessary to carry back the search to the time when the person searched against became entitled.

An *Official Search* can be obtained.

(*q*) 50 & 51 Vict. c. 57; and *cf. Hedges* v. *Preston* (1899), 80 L. T. 847.

(*r*) *Re Saumarez*, [1907] 2 K. B. 170.

(*s*) *Re Hobbins* (1899), 6 Manson, 212.

(*t*) Deeds of Arrangement Act, 1887, s. 17.

(*u*) It should be borne in mind that a deed of arrangement for the benefit of creditors *generally* is an act of bankruptcy under cl. (a) of s. 4 of the Bankruptcy Act, 1883; while a deed of arrangement for the benefit of particular creditors can only be assailed as a fraudulent transfer or preference under cl. (b) or (c). See *Re Phillips*, [1900] 2 Q. B. 329.

SECTION 7.

BANKRUPTCY.

Effect of Bankruptcy.—Upon an adjudication of bankruptcy being made the property of the bankrupt becomes divisible amongst his creditors and vests in a trustee (*x*), and the property divisible amongst his creditors comprises all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve on him before his discharge (*y*). As regards property acquired by a bankrupt after the commencement of his bankruptcy, but before he gets his discharge, it is true that it was decided in the case of *Cohen* v. *Mitchell* (*z*) that any transaction by the bankrupt with any person dealing with him bonâ fide and for value was valid even though such person had notice of the bankruptcy unless the trustee intervened, but it was held that this rule did not apply to after-acquired real estate, whether legal or equitable (*a*). It is now, however, provided that all transactions since March 31st, 1914, by a bankrupt with any person dealing with him bonâ fide and for value in respect of property, *whether real or personal*, acquired by the bankrupt after the adjudication shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which, by

(*x*) Bankruptcy Act, 1883, s. 20 (1).

(*y*) *Ibid.*, s. 44 (1).

(*z*) (1890), 25 Q. B. D. 262.

(*a*) *Re New Land Development Association and Gray*, [1892] 2 Ch. 138; *Official Receiver* v. *Cooke*, [1906] 2 Ch. 661. The rule does, however, apply to leaseholds. *Re Clayton and Barclay's Contract*, [1895] 2 Ch. 212; and see *ante*, Chap. V., Section 6.

virtue of the enactments relating to bankruptcy, is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction (*b*); and this applies to transactions with respect to real property completed before April 1st, 1914, in any case where there has not been any intervention by the trustee before that date (*c*).

What Search should be Made.—The necessity for making a search in bankruptcy must, to some extent, depend upon the position of the vendor, but it is often advisable when the last purchase took place at a recent date to make searches against the predecessor or predecessors in title of the vendor, though the provision last above-mentioned greatly diminishes the risk to the purchaser of being ousted from the property by a trustee in some undisclosed bankruptcy. The search should be for petitions, receiving orders, adjudications and schemes of arrangements, and should be carried back to the date when the person searched against acquired the property, if that was more than twelve years ago, if it was less it should be carried back to the date when the person searched against attained twenty-one.

No *Official Search* can be obtained.

SECTION 8.

SEARCHES TO BE MADE.

Against whom Search should be Made.—Unless the vendor is selling as *trustee* or *mortgagee*, the following searches should generally be made:

(*b*) Bankruptcy Act, 1913, s. 11. (*c*) *Ibid.*

I. An official certificate should be obtained of search in the Land Registry Office against the vendor, and where the circumstances noted above render it necessary his predecessors in title back to the last purchaser for value, for *lis pendens* and for annuities and rent-charges.

II. An official certificate should be obtained of search at the Land Registry Office against the same person or persons for writs and orders affecting land, and for deeds of arrangement and statutory land charges.

III. Search should be made at the Bankruptcy Court in accordance with what has been said above.

If the vendor is a trustee or mortgagee, a search for *lis pendens* for five years is generally sufficient; but where trustees for sale are selling *with the consent of the tenant for life*, the same searches should be made against the latter as if he were owner in fee.

If the vendor is tenant in tail, it may be advisable to search in the Central Office for enrolled deeds from the time when the tenant in tail attained twenty-one.

Special Cases.—If the property is situated in Middlesex or Yorkshire, the local registers (*d*) should be searched, except in the case of copyholds.

(*d*) The Middlesex deeds registry has now been removed to the Land Registry Office, Lincolns Inn Fields. The Yorkshire Registry Office is situate for the North Riding at Northallerton, for the East Riding and Hull at Beverley, and for the West Riding at Wakefield.

If the vendor is a company, the purchaser should, if possible, search the register of mortgages which is kept by the company under s. 100 of the Companies (Consolidation) Act, 1908, and it is also desirable to search the register kept by the Registrar of Joint Stock Companies (*e*).

If the property is copyhold, the Court rolls must be searched.

If the property sold has been registered under the Land Transfer Acts, no searches need be made in any other place than the Land Registry *since* the time of registration. But if, as is usually the case, only a possessory title has been registered, the usual searches should be made up to the time of registration.

An authority should be obtained from the vendor to inspect the register (Rule 284), and an official search made (Rule 289). The official certificate of the result of a search protects solicitors and persons acting in a fiduciary capacity (Rule 293).

It is, moreover, a proper precaution to search the index-map of registered land to see whether the land sold has been registered (Rule 283).

In appropriate cases inquiry should be made of the local authority as to the existence of charges for paving and sewering expenses.

(*e*) See s. 93.

CHAPTER XIX.

EXECUTION OF ASSURANCE AND PAYMENT OF PURCHASE MONEY.

SECTION 1.

DUTY OF THE PURCHASER TO SEE TO THE APPLICATION OF HIS PURCHASE MONEY.

Trustees.—When real estate was sold by trustees, it was formerly the duty of the purchaser to see that the purchase money was duly applied for the benefit of the beneficiaries, unless the trust directed the land to be sold for the payment of *debts generally*, or in express terms conferred upon the trustees the power of giving receipts (*a*).

Now, however, by s. 20 of the Trustee Act, 1893 (*b*), which re-enacts a similar provision in the Conveyancing Act, 1881 (*c*), it is provided that the receipt in writing of any *trustee* (which expression includes a *constructive trustee* or *legal personal representative*) (*d*) "for any money, securities, or other personal property or effects payable, transferable, or deliverable to him

(*a*) See *Elliot* v. *Merryman* (1740), Wh. & Tu., L. C. Eq., 8th ed., Vol. II., 913, and notes thereto.

(*b*) 56 & 57 Vict. c. 53.

(*c*) 44 & 45 Vict. c. 41, s. 36 (1); and *cf.* Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 29.

(*d*) Trustee Act, 1893, s. 50.

under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof." This section applies to the case of a bare trustee selling by the direction of the persons beneficially entitled (*e*).

Section 40 of the Settled Land Act, 1882 (*f*), contains a similar provision with regard to receipts by Settled Land Act trustees.

As the trust for sale is a joint office, the receipt must be signed by all the trustees.

Mortgagees.—Where mortgagees are parties to the conveyance, and one or more of the original mortgagees is dead, it is necessary, in the case of mortgages made before the Conveyancing Act, to see whether there was a proper *joint account clause* in the mortgage deed (*g*). In the absence of a joint account clause the presumption in equity is that the money was advanced in equal shares; and even if the language of the deed rebuts this presumption, the purchaser can require evidence that the joint tenancy has not been severed (*h*).

With regard, however, to mortgages executed since December 31st, 1881, it is enacted (*i*) that "where in a mortgage, or an obligation for payment of money,

(*e*) *Re British Land Co. and Allen's Contract* (1900), 44 Sol. J. 593.

(*f*) 45 & 46 Vict. c. 38.

(*g*) As to form of joint account clause, see *ante*, p. 276.

(*h*) As to severance of a joint tenancy, see *ante*, p. 267.

(*i*) Conveyancing Act, 1881, s. 61 (1).

or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account."

This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained (*k*).

With regard to *mortgagees selling* under the powers conferred by the Conveyancing Act, 1881 (*l*), it is enacted that "the receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be

(*k*) Conveyancing Act, 1881, s. 61 (2).

(*l*) See Chap. VI., Sect. 6.

concerned to inquire whether any money remains due under the mortgage" (*m*).

It is generally considered that trustee mortgagees, who have power to vary securities under their trust, can release a portion of the property comprised in their security without receiving an adequate proportion of the purchase money (*n*).

Keeping Trusts off the Title.—It is usual and proper, when a mortgage is made to trustees, to keep the trusts off the face of the mortgage deed, and to introduce a recital that the persons who are in fact trustees are entitled to the mortgage money, on a joint account. The court will not look behind this recital into the trusts affecting the mortgage money; and the purchaser need not concern himself as to the nature of those trusts (*o*).

But if the vendor inadvertently discloses the fact that the mortgagees are trustees of a particular settlement, the purchaser is entitled to an abstract of the settlement, so as to show that the mortgagees were duly appointed trustees, and are in a position to give a valid receipt for the mortgage moneys (*p*).

Heir or Devisee.—Before concluding this section, it is necessary to consider the case of a sale by an

(*m*) Conveyancing Act, 1881, s. 22. Lord Cranworth's Act contained a similar provision, 23 & 24 Vict. c. 145, s. 12.

(*n*) Dart, Vendors and Purchasers, 7th ed., 630, 631.

(*o*) *Re Harman and Uxbridge and Rickmansworth Rail. Co.* (1883), 24 Ch. D. 720; *Re Witham* (1901), 84 L. T. 585, and see also Conveyancing Act, 1911, s. 13.

(*p*) *Re Blaiberg and Abrahams*, [1899] 2 Ch. 340.

heir or beneficial devisee, where the land is charged with the payment of debts or legacies.

Section 18 of Lord St. Leonard's Act, which deals with the case of a beneficial devisee, as opposed to a devisee in trust, provides that ss. 14—16 of that Act (to which we have before referred (*q*)) shall not extend to a devise to any person *in fee or in tail* or for the testator's whole estate and interest charged with debts and legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they *may by law now do.* A devise in settlement to A. for life with remainder to B. (*r*), or a devise to the son of the testator who should first attain the age of twenty-five (*s*), is not a devise "in fee or in tail" within the meaning of s. 18, and in that case the executors can sell under s. 16.

In cases falling within s. 18, although that section seems to imply that the devisee has power to sell, yet if the devisee of real estate charged with the payment of debts is not also executor, it is probably still the duty of the purchaser, where the testator died prior to the Land Transfer Act, 1897, to see that the purchase money is properly applied (*t*), unless the executors concur in the sale, or have released the property by a deed which recited that all the debts had been duly discharged (*u*). If legacies only and not debts are charged and the beneficial devisee is selling, the

(*q*) *Ante*, p. 90 *et seq.*

(*r*) *Re Wilson* (1886), 54 L. T. 600.

(*s*) *Re Barrow-in-Furness and Rawlinson's Contract*, [1903] 1 Ch. 339.

(*t*) *Corser* v. *Cartwright* (1875), L. R. 7 H. L. 737, 741; but *cf.* dictum of KAY, L.J., in *Re Wilson* (1886), 34 W. R. 512.

(*u*) *Storry* v. *Walsh* (1854), 18 Beav. 559.

purchaser must require the concurrence of the legatees, since he is in that case bound to see to the application of his purchase money (*x*). On the other hand, where debts and legacies were not expressly charged on real estate, the heir or devisee could sell free from debts (whether simple or specialty), and thereupon the heir or devisee became personally liable for them to the extent of the value of the land aliened (*y*). Now, as we have seen, all freehold lands descend in the first place to the executors under the Land Transfer Act, 1897; but under s. 3 (1) of that statute, the executors may convey to the heir or devisee "subject to a charge for the payment of any money which the personal representatives are liable to pay." If the conveyance has been made in this form, it is conceived that the purchaser from the heir or devisee should either require evidence of payment of the debts of the deceased, or obtain the concurrence of the executors.

From the point of view of the devisee, a vague charge of this character seems to be highly objectionable. It is true that in a recent case (*z*) KEKEWICH, J., held that the charge did not apply to debts of which the executors had no notice at the time of the conveyance. In that case it appears to have been admitted that the estate had been properly administered, and that there remained unpaid no debt of the testator of which the executors had notice (*a*). But it does not appear how a purchaser from the devisee is to satisfy himself as

(*x*) *Re Rebbeck* (1894), 63 L. J. Ch. 596.

(*y*) *Re Hedgely* (1886), 34 Ch. D. 379. The lord claiming by escheat or a voluntary assignee of the heir or devisee is equally liable (*Re Hyatt* (1888), 38 Ch. D. 609).

(*z*) *Re Cary and Lott's Contract*, [1901] 2 Ch. 463.

(*a*) *Ibid.*, at p. 467.

to this negative fact, viz., that the executors had no notice of any liability. If the executors have no notice of any liability, there seems no reason for creating the charge, since in any case the executors would be protected by s. 29 of Lord St. Leonard's Act.

It is submitted that the intention of the legislature was to provide for the case where the executors *have notice* of a contingent liability, *e.g.*, in respect of shares held by the testator or covenants entered into by him, which would not justify them in postponing distribution, but which may subsequently ripen into a debt. In that case, by creating the charge the executors are protected from any personal liability for devastavit (*b*), since their liabilities in respect of the land cease.

SECTION 2.

DISCHARGE OF INCUMBRANCES UNDER THE CONVEYANCING ACT.

Payment into Court.—As we have already seen (*c*), incumbrances which affect the property in the hands of a purchaser must be removed by the vendor or be paid off out of the purchase money, and any assignee of the unpaid purchase money takes subject to the purchaser's right in this respect (*d*). Where the property is subject to a mortgage which is not redeemable for a fixed period, or to portions for younger children which are not yet raisable (*e*), the purchaser

(*b*) *Cf.* Williams, Executors, 10th ed., 1079.

(*c*) *Ante*, p. 409.

(*d*) *Lacey* v. *Ingle* (1847), 2 Phil. 413; *Greenwood* v. *Taylor* (1845), 14 Sim. 505.

(*e*) *Sheppard* v. *Wilson* (1845), 4 Hare, 394.

may have recourse to the provisions of s. 5 of the Conveyancing Act, 1881, although it seems that, where it would inflict a hardship on the vendor, the purchaser cannot compel him to make use of this section (*f*). The section provides:

"(1) Where land subject to any incumbrance, whether immediately payable or not, is sold by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount.

"(2) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

"(3) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(*f*) *Re Great Northern Rail. Co. and Sanderson* (1884), 25 Ch. D. 788.

"(4) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made." (g).

SECTION 3.

EXECUTION OF THE CONVEYANCE.

Attendance of Vendor.—It is unusual for the vendor personally to attend the completion of the purchase, but the purchaser, prior to January 1st, 1882, was entitled to require the conveyance to be executed *in the presence of his solicitor*. Section 8 of the Conveyancing Act, 1881, now provides that "on a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor."

In practice the conveyance is now executed by the vendor, and handed to his solicitor as an escrow (*h*). The solicitor fills in the date, and delivers the deed to the purchaser on receiving the purchase money.

Execution by Vendor.—The parties in whom the estate is vested should themselves execute the

(*g*) As to the interpretation of this section, see *Re Freme's Contract*, [1895] 2 Ch. 261. By s. 1 of the Conveyancing Act, 1911, on any application under the section the court may if it thinks fit, as respects any purchaser or vendor, dispense with the service of any notice which is by s. 69 of the Act of 1881 required to be served on any purchaser or vendor.

(*h*) *Walker* v. *Ware Rail. Co.* (1865), 35 Beav. 52.

conveyance to the purchaser, or if the estate is of copyhold tenure, surrender in person (*i*). It was formerly held that a purchaser was not bound to accept an execution under a power of attorney (*k*); but it is submitted that he would now be bound to do so if the power of attorney came within the provisions of s. 8 or s. 9 of the Conveyancing Act, 1882 (*l*). The conveyance of a married woman's interest in real estate under a power of attorney was formerly inoperative (*m*); but now the Conveyancing Act, 1881, s. 40, provides that a married woman, whether an infant or not, shall have power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do. There is now no reason why any married woman may not execute a power of attorney, although her separate property may be subject to a restraint on anticipation; but, of course, she cannot get rid of the restraint on anticipation by executing any such power (*n*): nor can she by so doing dispense with an acknowledgment when one would otherwise be necessary (*o*).

If the conveyance contains covenants by the purchaser, he should execute the deed, although it is probable that his non-execution would be no

(*i*) *Mitchel* v. *Neale* (1755), 2 Ves. 679; *Noel* v. *Weston* (1821), 6 Madd. 50.

(*k*) *Wallace* v. *Cook* (1804), 5 Esp. 117.

(*l*) 45 & 46 Vict. c. 39. See *ante*, p. 260.

(*m*) *Graham* v. *Jackson* (1845), 6 Q. B. 811.

(*n*) *Stewart* v. *Fletcher* (1888), 38 Ch. D., at p. 628.

(*o*) Wolstenholme, 93.

defence after he has accepted the benefit of the conveyance (*p*).

SECTION 4.

PAYMENT OF PURCHASE MONEY.

Payment to Vendor's Solicitor.—Formerly when the vendor was not present at completion to receive the purchase money, the purchaser was entitled, notwithstanding the receipt upon the deed, to be furnished with a written request directed to him and signed by the vendor for payment of the purchase money to his solicitor. Section 56 of the Conveyancing Act (*q*) now provides that "where a solicitor produces a deed, having in the body thereof (*r*) or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt." The solicitor producing the deed must be the solicitor *acting for the vendor*, and it is not sufficient that the deed is in his office if he does not actually produce it (*s*).

(*p*) *May* v. *Belleville*, [1905] 2 Ch. 605; Dart, Vendors and Purchasers, 7th ed., 585.

(*q*) 44 & 45 Vict. c. 41.

(*r*) As to receipts in the body of the deed, see s. 54 and *ante*, p. 273.

(*s*) *Day* v. *Woolwich Equitable Building Society* (1888), 40 Ch. D. 491; but *cf*. *King* v. *Smith*, [1900] 2 Ch. 425.

It is conceived that payment to the clerk of the vendor's solicitor would not come within the protection afforded by this section.

Where the vendors were trustees, it was the duty of the purchaser, prior to the Trustee Act, 1888 (*t*), to pay the purchase money to the trustees personally, or to their joint account at a bank. It is now provided by s. 17 of the Trustee Act, 1893 (*u*) (which re-enacts s. 2 of the Trustee Act, 1888), that "a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section fifty-six of the Conveyancing and Law of Property Act, 1881."

If the solicitor of the trustees produces a deed having in the body thereof, or indorsed thereon, a receipt by the trustees for the consideration money, the purchaser is not entitled to require proof that the solicitor has, in fact, been appointed to receive the purchase money under s. 17, unless there are suspicious circumstances (*x*). It must, however, be remembered that the solicitor must be appointed agent for the *particular transaction*, since a trustee cannot delegate to others his general duties as trustee (*y*).

The purchase money should be paid in cash or

(*t*) 51 & 52 Vict. c. 59. (*u*) 56 & 57 Vict. c. 53.

(*x*) *Re Hetling and Merton's Contract*, [1893] 3 Ch. 269, at p. 280.

(*y*) *Re Hetling and Merton's Contract*, *supra*.

notes or by banker's drafts. In some cases the vendor's solicitor accepts a cheque, but if he parts with the title deeds and conveyance before he has satisfied himself that the cheque will be honoured, he does so at his own risk (z).

The question of handing over title deeds upon completion has already been dealt with in discussing conditions of sale (a).

(z) *Papè* v. *Westacott*, [1894] 1 Q. B. at p. 278.

(a) *Ante*, p. 314.

CHAPTER XX.

STAMP DUTIES.

SECTION 1.

STAMP ON CONVEYANCES ON SALE.

Rates of Duty.—By the Stamp Act, 1891 (*a*), Schedule I., conveyances on sale of real or leasehold property are chargeable with the following duties:

				£	s.	d.
Where the amount or value of the consideration for the sale does not exceed £5				0	0	6
Exceeds £5 and does not exceed £10				0	1	0
,,	10	,, ,,	15	0	1	6
,,	15	,, ,,	20	0	2	0
,,	20	,, ,,	25	0	2	6
,,	25	,, ,,	50	0	5	0
,,	50	,, ,,	75	0	7	6
,,	75	,, ,,	100	0	10	0
,,	100	,, ,,	125	0	12	6
,,	125	,, ,,	150	0	15	0
,,	150	,, ,,	170	0	17	6
,,	175	,, ,,	200	1	0	0
,,	200	,, ,,	225	1	2	6
,,	225	,, ,,	250	1	5	0
,,	250	,, ,,	275	1	7	6
,,	275	,, ,,	300	1	10	0
,,	300					
For every £50 and also for every fractional part of £50 of such amount or value				0	5	0

(*a*) 54 & 55 Vict. c. 39. The table is the same as under the previous Act of 1870 (33 & 34 Vict. c. 97).

But it is provided by s. 73 of the Finance (1909—1910) Act, 1910 (*b*), that the stamp duties chargeable shall be double those specified in the above schedule: provided that this shall not apply to a conveyance or transfer where the amount or value of the consideration for the sale does not exceed £500, and the instrument contains a statement certifying that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £500.

Definition of Conveyance on Sale.—The term *conveyance on sale* includes every instrument and every decree or order of any court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction (*c*). A judgment for foreclosure must be stamped as a conveyance on sale under this section (*d*).

Where there are several conveying parties having separate interests in the same property, only one stamp is necessary, and where a mortgagee joins in a conveyance, the deed is not chargeable with "reconveyance" duty in addition to the *ad valorem* sale duty. Where, however, separate interests in separate property are conveyed *by* several parties in one interest, or where separate properties are

(*b*) 10 Edw. 7, c. 8.

(*c*) Stamp Act, 1891, s. 54.

(*d*) *Re Lovell and Collard*, [1907] 1 Ch. 249; and see Finance Act, 1898 (61 & 62 Vict. c. 10), s. 6.

conveyed *to* several parties by one instrument, several stamps are requisite (*e*).

An instrument which contains two or more operative parts, each falling under a specific head of charge, must be stamped with the appropriate duty for each operation (*f*); but a conveyance on sale is not chargeable with additional duty in respect of a covenant by the purchaser to make improvements on, or additions to, the property conveyed to him (*g*).

Voluntary Conveyance.—Formerly voluntary conveyances of land where not subject to *ad valorem* duty but only required a 10*s*. stamp. Now, however, the Finance (1909—1910) Act, 1910, s. 74, makes any conveyance or transfer operating as a voluntary disposition *inter vivos* chargeable with the like stamp duty as if it were a conveyance or transfer on sale with the substitution in each case of the value of the property conveyed for the amount of the value of the consideration for the sale: But this does not apply to a conveyance or transfer operating as a voluntary disposition of property to a body of persons incorporated by a special Act, if that body is by its Act precluded from dividing any profit among its members, and the property conveyed is to be held for the purposes of an open space or for the purposes of its preservation for the benefit of the nation.

Any conveyance or transfer (not being a disposition

(*e*) Alpe, Stamp Duties, 108.

(*f*) *Hadgett* v. *Commissioners of Inland Revenue* (1877), 3 Ex. D. 46.

(*g*) Finance Act, 1900 (63 Vict. c. 7), s. 10.

made in favour of a purchaser or incumbrances or other person in good faith and for valuable consideration), is for the purposes of this section to be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*, and (except where marriage is the consideration) the consideration for any conveyance or transfer is not for this purpose to be deemed to be valuable consideration when the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred.

But a conveyance or transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan, or made for effectuating the appointment of a new trustee, or the retirement of a trustee whether the trust is express or implied, or under which no beneficial interest passes in the property conveyed or transferred or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust whether express or implied, or a disentailing assurance not limiting any new estate other than an estate in fee simple in the person disentailing the property, is not to be charged with duty under this section, and this notwithstanding that the circumstances exempting the conveyance or transfer from charge under this section are not set forth in the conveyance or transfer.

SECTION 2.

CONSIDERATION, HOW ASCERTAINED.

Consideration must be truly set forth. — The *ad valorem* stamp duty must be paid on the true consideration for the sale, and upon the price of all property passing by the conveyance, and any one who with intent to defraud the revenue executes any instrument in which all the facts and circumstances affecting its liability to duty are not fully and truly set forth, or being concerned in the preparation of any instrument neglects or omits fully and truly to set them forth, incurs a fine of £10 (*h*).

Stock or Securities.—The consideration for a conveyance on sale is usually a gross sum of money, but it may also consist of stock or securities, of periodical payments, such as an annuity, of a debt due from the vendor to the purchaser, or a liability of the vendor undertaken by the purchaser. The Stamp Act, 1891 (*i*), makes the following provisions with regard to these different kinds of consideration:—

Where the consideration, or any part of the consideration, for a conveyance on sale consists of any *stock* or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security (*k*). The duty is to be calculated on the value on the day of the date of the instrument of the money in British currency according to the current rate of exchange, or of the stock or

(*h*) Stamp Act, 1891, ss. 5, 12.

(*i*) *Ibid.*, ss. 55, 56, 57.

(*k*) *Ibid.*, s. 55 (1).

security according to the average price thereof (*l*). Where stocks or securities are not quoted, their value must either be taken at par, or based on an average of the latest private transactions (*m*).

Where the consideration, or any part of the consideration, for a conveyance on sale consists of any security *not being a marketable security*, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon the security (*n*).

Periodical Payments.—Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable PERIODICALLY, for a definite period *not exceeding twenty years*, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on such total amount (*o*).

Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period *exceeding twenty years* or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will, or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date

(*l*) Stamp Act, 1891, s. 6 (1).
(*m*) Alpe, Stamp Duties, 21.
(*n*) Stamp Act, 1891, s. 55 (2).
(*o*) *Ibid.*, s. 56 (1).

of the instrument (p). Money is "payable periodically" under this sub-section, although payable on a contingency or more than one contingencies (q).

Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically *during any life or lives*, the conveyance is to be charged in respect of such consideration with *ad valorem* duty on the amount which will, or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of the instrument (r).

Provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing such periodical payments, is to be charged with any duty whatsoever in respect of such provision, and no separate instrument made in any such case for securing such periodical payments is to be charged with any higher duty than 10*s*. (s).

Where the purchase money is payable by instalments, with interest in default of payment, no further duty is chargeable (t); but if the payment of the purchase money is secured by a mortgage of the property by the purchaser to the vendor, the deed must be stamped as a mortgage as well as a conveyance on sale (u).

(p) Stamp Act, 1891, s. 56 (2).

(q) *Underground Electric Rail. Co.* v. *Inland Revenue*, [1906] A. C. 21.

(r) Stamp Act, 1891, s. 56 (3).

(s) *Ibid.*, s. 56 (4).

(t) *Limmer Asphalte Co.* v. *Commissioners of Inland Revenue* (1872), L. R. 7 Ex. 216.

(u) Dart, Vendors and Purchasers, 6th ed., 796.

Where a person sells part of a leasehold property apportioning the rent between himself and the purchaser with mutual covenants for indemnity, the covenant by the assignee is not part of the consideration for the assignment, and no additional duty is chargeable (*x*).

Conveyance in consideration of a Debt.—Where any property is conveyed to any person in consideration wholly or in part of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, *whether being or constituting a charge or incumbrance upon the property or not*, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty (*y*).

SECTION 3.

CONVEYANCE BY SEPARATE INSTRUMENTS.

Rules for Assessment of Duty.—Where property contracted to be sold for one consideration for the whole is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration (*z*).

(*x*) *Swayne* v. *Commissioners of Inland Revenue*, [1899] 1 Q. B. 335.

(*y*) Stamp Act, 1891, s. 57.

(*z*) *Ibid.*, s. 58 (1).

Where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified (*a*).

Where there are several instruments of conveyance for completing the purchaser's title to property sold, the *principal instrument* of conveyance only is charged with *ad valorem* duty, and the other instruments are to be respectively charged such other duty as they may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument (*b*). Except in the case of copyholds, the parties may determine which of several instruments is to be deemed the principal instrument (*c*).

SECTION 4.

SUB-SALES.

Rules for Assessment of Duty.—Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged

(*a*) Stamp Act, 1891, s. 58 (2).
(*b*) *Ibid.*, s. 58 (3). (*c*) *Ibid.*, s. 61 (2).

with *ad valorem* duty in respect of the consideration moving from the sub-purchaser (*d*).

Where a person having contracted for the purchase of any property, but not having obtained a conveyance, contracts to sell the whole or any part or parts thereof to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration (*e*).

Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him, and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable with a 10*s*. duty, or, if the *ad valorem* duty would be less than 10*s*., with such less amount (*f*).

SECTION 5.

COPYHOLDS (*g*).

What Document to be stamped.—Where an *equitable* interest in copyholds is conveyed, the deed of conveyance must be stamped with *ad valorem* duty (*h*).

In other cases the surrender or grant, if made *out*

(*d*) Stamp Act, 1891, s. 58 (4).

(*e*) *Ibid.*, s. 58 (5).

(*f*) *Ibid.*, s. 58 (6).

(*g*) See also Scriven, Copyholds, 7th ed., 1896.

(*h*) Stamp Act, 1891, s. 61 (1) (a).

of court, or the memorandum thereof, and the copy of the court roll of the surrender or grant, if made *in court*, is to be deemed the principal instrument (*i*). An *admittance* to copyholds is not liable to stamp duty.

The copy of court roll of a surrender or grant made out of court shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, or the memorandum thereof, is duly stamped, of which fact the certificate of the steward of the manor on the face of such copy shall be sufficient evidence (*k*).

The entry upon the court rolls of a surrender or grant shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, if made out of court, or the memorandum thereof, or the copy of court roll of the surrender or grant, if made in court, is duly stamped, of which fact the certificate of the steward of the manor in the margin of such entry shall be sufficient evidence (*l*).

No instrument is to be charged more than once with duty by reason of relating to several distinct tenements, in respect whereof several fines and fees are due to the lord or steward of the manor (*m*).

Where freeholds and copyholds are conveyed together the consideration should be apportioned.

Facts affecting Duty to be stated.—All the facts and circumstances affecting the liability to *ad valorem* duty of the copy of court roll of any surrender or

(*i*) Stamp Act, 1891, s. 61 (1) (b).

(*k*) *Ibid.*, s. 65 (2).

(*l*) *Ibid.*, s. 65 (3).

(*m*) *Ibid.*, s. 65 (1).

grant made in court, or the amount of *ad valorem* duty with which any such copy of court roll is chargeable, are to be fully and truly stated in a *note* to be delivered to the steward of the manor before the surrender or grant is made (*n*).

The steward of every manor shall refuse to accept in court any surrender, or to make in court any grant, until such a note as aforesaid has been delivered to him, or to enter on the court rolls, or accept any presentment of, or admit any person to be tenant under or by virtue of, any surrender or grant made out of court, or any deed which is not duly stamped (*o*).

The steward of every manor shall, within four months from the day on which any surrender or grant is made in court, make out a duly stamped copy of court roll of such surrender or grant, and have the same ready for delivery to the person entitled thereto, and if he neglects so to do, shall forfeit the sum of £50, and the duty payable in respect of the copy of court roll shall be a debt to His Majesty from the steward, whether he shall have received it or not, and if he has not received the duty, the same shall also be a debt to His Majesty from the party entitled to the copy (*p*).

Rights of Steward.—The steward of any manor may, before he accepts in court any surrender or makes in court any grant, demand and insist on the payment of his lawful fees in relation to the surrender

(*n*) Stamp Act, 1891, s. 66 (1).

(*o*) *Ibid.*, s. 66 (2). The Act imposes a fine of £50 on the steward or any other person who attempts to evade these provisions.

(*p*) Stamp Act, 1891, s. 67.

or grant, together with the duty payable on the copy of court roll thereof, and may refuse to proceed in the matter, or to deliver the copy of court roll to any person, until the fees and duty are paid (*q*).

Enfranchisement Deed. — An enfranchisement deed is stamped with *ad valorem* conveyance duty, and so also in an enfranchisement *award* (*r*).

SECTION 6.

STAMP ON COVENANTS.

Rate of Duty.—Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of or the title to the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid, where the *ad valorem* duty in respect of the consideration or mortgage money does not exceed 10*s*., is chargeable with a duty equal to the amount of such *ad valorem* duty, and in any other case with a duty of 10*s*. (*s*).

SECTION 7.

INCREMENT VALUE DUTY.

Payment of Duty on Sale.—On any transfer on sale of the fee simple of any land, or of any interest in any land, increment value duty must be assessed

(*q*) Stamp Act, 1891, s. 68.
(*r*) Copyhold Act, 1894, s. 58 (2); Copyhold Act, 1852, s. 32.
(*s*) Stamp Act, 1891, Sched. I.

by the Commissioners and paid by the transferor. For this purpose the transferor is to present the conveyance or reasonable particulars thereof under penalty of a fine of £10, and the liability to pay interest at the rate of five per cent. per annum on the duty ultimately payable as from the date on which the conveyance was executed. The duty is payable by a stamp, and the conveyance will not be deemed duly stamped for the purposes of s. 14 of the Stamp Act, 1891, unless it is stamped—

(*a*) either with a stamp denoting that the increment value duty has been assessed by the Commissioners and paid in accordance with the assessment; or

(*b*) with a stamp denoting that all particulars have been delivered to the Commissioners which, in their opinion, are necessary for the purpose of enabling them to assess the duty and that security has been given for the payment of duty in any case where the Commissioners have required security; or

(*c*) with a stamp that, upon the occasion in question, no increment value duty was payable (*t*).

Rate of Duty.—The rate of duty is £1 for every complete £5 of the increment value accruing after the 30th April, 1909 (*u*).

(*t*) Finance (1909—1910) Act, 1910, ss. 3 (6), and 4 (1), (2), and (3); and see *ante*, p. 249.

(*u*) *Ibid.*, s. 1.

CHAPTER XXI.

REGISTRATION, ENROLMENT, ETC.

SECTION 1.

REGISTRATION OF TITLE.

When Compulsory.—If the property sold, being of freehold or leasehold tenure, is situate *within the county of London*, and is not already on the register, it is now necessary (subject to the exceptions hereafter mentioned) for the purchaser to register his title. If he neglects to do so, the legal estate, notwithstanding the conveyance, remains in the vendor. The title registered must be not less than a possessory title, but he may be registered with any other title if the registrar is satisfied with his title (*a*).

Registration is not, however, compulsory in the case of—

(1) Incorporeal hereditaments.
(2) Mines or minerals apart from the surface.
(3) Leases having *less than forty years* to run or two lives to fall in.
(4) Undivided shares of land.
(5) Freeholds intermixed and undistinguishable from lands of other tenure (*b*).

(*a*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 20.

(*b*) Lands of mixed tenure may, if desired, be registered. See s. 67 of the Land Transfer Act, 1875.

(6) Corporeal hereditaments parcel of a manor and included in the sale of a manor as such (*c*).

Moreover, it must be remembered that the Land Transfer Acts do not apply to copyholds, or to customary freeholds where admission or any act by the lord of the manor is necessary to perfect the title of a purchaser (*d*), or to underleases originally created for mortgage purposes (*e*), or to leaseholds subject to an absolute prohibition against alienation (*f*).

Registration became compulsory in the *county of London* as follows, viz.:

(1) In the parishes of Hampstead, St. Pancras, St. Marylebone, and St. George's Hanover Square, on *January* 1*st*, 1899.

(2) In the parishes of Shoreditch, Bethnal Green, Mile End Old Town, Wapping, St. George's-in-the East, Shadwell, Radcliff, Limehouse, Bow, Bromley, and Poplar, on *March* 1*st*, 1899.

(3) In the parishes of Chelsea, Christchurch Spitalfields, Clerkenwell, Fulham, Glasshouse Yard, Hackney, Hammersmith, Islington, Kensington, Mile End, New Town, Paddington, Saffron Hill, St. George the Martyr and St. Andrews Holborn above Bars, St. Anne Westminster, St. Botolph without Aldgate (except the city portion thereof), St. Clement

(*c*) Land Transfer Act, 1897, s. 24.

(*d*) *Ibid.*, s. 1 (4).

(*e*) *Ibid.*, First Schedule. On sales by mortgagees of leaseholds in the compulsory area, the nominal reversion is frequently left outstanding in order to avoid the necessity of registering.

(*f*) Land Transfer Act, 1875, s. 11.

Danes, St. Giles-in-the-Fields, St. George Bloomsbury, St. James Westminster, St. Luke Westminster, St. Margaret and St. John the Evangelist Westminster, St. Martin-in-the-Fields, St. Mary le Strand, St. Paul, Covent Garden, St. Sepulchre, Stoke Newington, Whitechapel, the Precinct of the Savoy, the Liberty of the Rolls, Westminster Close, Charterhouse, the Liberty of Norton Folgate, the Old Artillery Ground, Furnival's Inn (except the city portion thereof), Gray's Inn, Lincoln's Inn and Staple Inn, on *October* 1*st*, 1899.

(4) In the parishes of Christ Church (Southwark), St. George the Martyr, Camberwell, Horselydown, Lambeth, Bermondsey, Newington, Rotherhithe, St. Olive and St. Thomas, St. Saviour, and the detached part of the parish of Streatham, between the parishes of Lambeth and Camberwell, on *January* 1*st*, 1900.

(5) In the parishes of Battersea, Clapham, Putney, Tooting Graveney, Wandsworth, and the remainder of the parish of Streatham, on *May* 1*st*, 1900.

(6) In the remainder of the county except the hamlet of Penge (*g*) and the city of London, on *November* 1*st*, 1900.

(7) In the city of London, on *July* 1*st*, 1902.

(*g*) The hamlet of Penge was taken out of the county of London and made part of the county of Kent by Order in Council made in the year 1900.

SECTION 2.

PROCEDURE FOR REGISTERING A TITLE.

Form of Application.—Application for registration of freehold land (*h*) must be made by delivering at the registry a written application in the following form:

LAND REGISTRY.

(*Land Transfer Acts,* 1875 *and* 1897.)

I, A.B., of etc., hereby apply for registration as proprietor, with Absolute (*or* Possessory) title, of the freehold property in the parish of in the County of described in the accompanying conveyance (*or other instrument, as the case may be*) dated the of , made between C.D. of the one part and myself (*or* E.F. of etc.) of the other part (*or* shown and edged with red on the accompanying plan, *or other particulars sufficient to enable the property to be fully identified on the Ordnance Map or Land Registry General Map*), and I declare as follows:—

1. (*Where the applicant is a purchaser on sale.*) I purchased the property from the said C.D. on the of , and paid the whole of the purchase money of £ to him (*or otherwise as the case may be*), G.H., of , solicitor, acting as my solicitor in the matter.

or (*when the applicant is not a purchaser on sale*)

I have been in possession (or receipt of the rents and profits) of the property for upwards of years.

(*h*) Separate forms of application are provided for leasehold land. See forms 2 and 3 in the First Schedule to the Land Transfer Rules, 1908.

2. I am entitled for my own benefit to the fee simple in the property (*or otherwise as the case may be*) and am not aware of any contract or agreement for sale, or of any mortgage, charge, lien, lease, agreement for lease, restrictive covenant, or other incumbrances (*if so*, except as stated in the said conveyance *or* in the Schedule hereto) affecting the property or any part thereof.

3. I am not aware of any question or doubt affecting the title to the property or any part thereof, or of any matter or thing whereby the title is or may be impeached, affected, or called in question in any manner whatsoever.

4. The deeds and documents mentioned in the accompanying list signed by me and dated, etc., are all the deeds and documents relating to the title which I have in my possession or under my control, including opinions of counsel, abstracts, contracts, and conditions of sale, requisitions, replies, and other like documents in regard to the title.

Note.—The application may be signed by the applicant or (except where a nominee is to be registered) by his solicitor. The declaration may be signed by the applicant or his solicitor, or in part by the applicant, and in part by his solicitor, the necessary alterations in either case being made in the form.

THE SCHEDULE, *if necessary*,

(*to contain short particulars of the contracts, incumbrances, leases, etc., if any, referred to in the declaration.*)

If the registrar thinks fit application for registration may be made instead by delivering at the registry

the draft entries for the register approved by the applicant or his solicitor (*i*).

What Documents Necessary.—The application must (unless the registrar shall otherwise direct), be accompanied by—

(i) all such original deeds and documents relating to the title as the applicant has in his possession or under his control, including opinions of counsel, abstracts of title, contracts for or conditions of sale, requisitions, replies and other like documents, in regard to the title, and

(ii) a copy or sufficient abstract of the latest document of title, not being a document of record, and

(iii) sufficient particulars, by plan or otherwise, to enable the land to be fully identified on the Ordnance Map or Land Registry General Map,

and a list in duplicate of all documents delivered at the registry must be left with the documents (*k*).

If the applicant for registration desires to annex conditions to the land under the provisions of Section 84 of the Act of 1875, as amended by the Act of 1897, such conditions must be stated in or delivered with the application (*l*).

When the application is for registration in the name of a nominee, or is made by a purchaser, the consent

(*i*) Land Transfer Rules, 1908, r. 18.

(*k*) *Ibid.*, r. 19.

(*l*) *Ibid.*, r. 20. See *Willé* v. *St. John*, [1910] 1 Ch. 84, 325.

in writing of the nominee, or of the vendor or his solicitor, must be delivered with the application (*m*).

Exemption of Registered Land from Local Registries.—When land situate within the jurisdiction of any of the local registries is registered under the Land Transfer Acts, it is exempt from such jurisdiction *from and after the date of registration thereof*; and no document relating to any such registered land executed, and no testamentary instrument relating to any such registered land coming into operation subsequently to such date as aforesaid, shall be required to be registered in any of the local registries (*n*). Where the land included in any application for registration is subject to the jurisdiction of the Middlesex or Yorkshire registries of deeds, the registration shall be deemed for the purpose of removing the land from that jurisdiction to have taken place *at the beginning of the day* on which the application is delivered at the land registry, and prior to any registration on that day of a memorial in the local deed registry (*o*). Moreover, registration of a possessory title to land in Middlesex renders unnecessary the registration in the Middlesex Deeds Registry of the conveyance which confers the right to apply for registration of the title (*p*).

(*m*) Land Transfer Rules, 1908, r. 21.

(*n*) Land Transfer Act, 1875, s. 127.

(*o*) Land Transfer Rules, 1903, r. 28.

(*p*) Land Registry (Middlesex Deeds) Act, 1891, 54 & 55 Vict. c. 64. First Schedule, par. 14.

SECTION 3.

REGISTRATION OF DEEDS.

Form and Contents of Memorial.—A memorial of a conveyance must be under the hand (q), of some or one of the grantors, or some or one of the grantees, his or their heirs, executors or administrators, guardians or trustees, attested by one witness. The witness to the memorial must be a witness to the original document, unless at the date of the memorial every such witness is dead or absent from the United Kingdom, or cannot be found, or some other sufficient cause exists to prevent it.

Every memorial must contain the address and description of the witness to the memorial (r), and also in so far as the same appear from the original instrument must mention—(1) the date of the conveyance; (2) the names and additions of all parties to the deed, and when practicable the places of their abode; (3) the lands and hereditaments contained in the conveyance, and the parishes in which they are situate. When the original instrument contains a plan, a copy thereof must be drawn in the memorial, unless owing to its size this cannot be done; in which case a tracing on linen signed by the person signing the memorial and by one witness must be left with the memorial and filed in the office (s). A memorial

(q) It is no longer necessary to *seal* any memorials in Middlesex (see Land Registry (Middlesex Deeds) Rules, 1892, r. 5); but a seal would still appear to be necessary in Yorkshire.

(r) Land Registry (Middlesex Deeds) Rules, 1892, r. 3.

(s) *Ibid.*, r. 4.

is charged with a 2*s*. 6*d*. Inland Revenue stamp, and a 5*s*. Land Registry stamp (*t*).

SECTION 4.

REGISTRATION OF ASSURANCES TO CHARITABLE USES.

Conditions of Assurances for Charity.—The statute 9 Geo. 2, c. 36, prohibited the assurance of land for charitable uses except upon certain conditions. This Act is now repealed by the Mortmain and Charitable Uses Act, 1888 (*u*), Part II. of which replaces it.

The Act of 1888 lays down the conditions under which assurances to charitable uses may be made, both as to the nature of the assurance and the manner in which it is to be carried out.

Nature of the Assurance.—With regard to the nature of the assurance, the Act provides that—

(1) The assurance must be made to take effect *in possession* for the charitable uses to or for the benefit of which it is made immediately from the making thereof (*x*).

(2) The assurance must be *without any power of revocation* (*y*).

(*t*) Stamp Act, 1891, Sched. I. Memorial.

(*u*) 51 & 52 Vict. c. 42, s. 13. This Act applies to tenements and hereditaments corporeal or incorporeal of any tenure, but not to money secured on land. See the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3.

(*x*) S. 4 (2). See *Fisher* v. *Brierley* (1863), 10 H. L. Cas. 159.

(*y*) S. 4 (3).

(3) The assurance must not contain any reservation, condition, or provision for the benefit of the assuror, or any person claiming under him (*y*), with the exception of certain stipulations mentioned in s. 4 (4); and also with the exception that, in the case of a sale, the consideration may consist of a rent, rent-charge, or other annual payment (*z*).

Manner in which Assurance must be carried out.—With regard to the manner in which the assurance is to be carried out, the Act provides that—

(1) The assurance must be by deed executed in the presence of at least *two witnesses*, except in the case of copyholds (*a*).

(2) Unless made for valuable consideration, the assurance must be executed at least twelve months before the death of the assuror (*b*).

(3) The assurance must *within six months* after execution be *enrolled* in the Central Office of the Supreme Court, unless the charitable uses are declared by a separate instrument, in which case that separate instrument must be enrolled within six months after the making of the assurance of the land (*c*).

Non-enrolment.—Where there has been an omission to enrol the deed of assurance in proper time through ignorance or inadvertence, it may be subsequently enrolled upon payment of the proper fees, provided

(*z*) S. 4 (5).
(*a*) S. 4 (6).
(*b*) S. 4 (7).
(*c*) S. 4 (8).

that the deed was made in good faith for valuable consideration, and complied with the condition to which we have already referred; and provided that there are no proceedings pending to set aside the conveyance (*d*). It appears that a *voluntary* conveyance to charitable uses cannot be subsequently enrolled.

It must be borne in mind that enrolment will not be presumed even after the lapse of many years (*e*).

The grantor is not estopped from setting aside a voluntary deed which has not been duly enrolled (*f*); but in the case of a conveyance for value, it is presumed that equity would treat the instrument as an agreement to convey and enforce further assurance (*g*).

Exemptions.—The conditions with regard to assurances to charitable uses set out above do not apply in the following cases:

I. An assurance of land for charitable uses already enrolled under the Acts (*h*).

II. An assurance for the purposes only of a public park, a school-house for an elementary school, or a public museum; provided that a deed containing such an assurance and made otherwise than in good faith for full and valuable consideration must be executed twelve months before the death of the assuror, and must be

(*d*) S. 5 (1), (2) and (3).

(*e*) *Doe* d. *Howson* v. *Waterton* (1819), 3 B. & Ald. 149.

(*f*) Tudor, Charities, 446.

(*g*) *Mestaer* v. *Gillespie* (1806), 11 Ves. 625.

(*h*) *Ashton* v. *Jones* (1860), 28 Beav. 460.

enrolled *in the books of the Charity Commissioners* within six months after execution (*i*).

III. An assurance by deed to any local authority for any purpose for which such authority is empowered by any Act of Parliament to acquire land (*k*). It would seem that enrolment in the books of the Charity Commissioners is also necessary in this case, unless the conveyance is for value.

IV. An assurance of land in trust for any of the five universities (Oxford, Cambridge, London, Durham, and Victoria), or any of the colleges or houses of learning therein, or in trust for any of the colleges of Eton, Winchester, and Westminster (*l*).

V. An assurance of land not exceeding *two acres* made in good faith and for valuable consideration for the promotion of education, art, literature, science, or other like purposes (*m*).

Assurances by Will.—With regard to *wills*, it may be mentioned in this connection that land may be devised, or personal estate to be applied in the purchase of land may be bequeathed, for the purposes only of a public park, a school-house for an elementary school, or a public museum; provided that the will is executed twelve months before the testator's death,

(*i*) Mortmain and Charitable Uses Act, 1888, s. 6.

(*k*) Mortmain and Charitable Uses Act, 1892, s. 1; and *cf.* Chap. V., Sect. 4, *ante*.

(*l*) Mortmain and Charitable Uses Act, 1888, s. 7 (1).

(*m*) *Ibid.*, s. 7 (2).

and is enrolled six months after his death *in the books of the Charity Commissioners*, and provided that the quantity of land does not exceed *twenty acres* for any one public park, *two acres* for any one public museum, and *one acre* for any one school-house (*n*).

A devise of land, or a bequest of personalty to be laid out in the purchase of land, for the benefit of a charitable use, other than the above-mentioned charities, is void if the testator died before August 5th, 1891 (*o*). In the case of a testator dying since that date, such devise or bequest is not void, but the land must be sold within *one year from the testator's death*, and the personalty is held for the benefit of the charity as though there had been no direction to lay it out in the purchase of land (*p*). The High Court or the Charity Commissioners may sanction the retention or acquisition of land which is required for *actual occupation* for the purposes of the charity (*q*).

SECTION 5.

ENROLMENT OF ASSURANCES OF CROWN LANDS.

Enrolment in Land Revenue Office.—Conveyances or assurances of Crown lands, when enrolled in the office of land revenue records and enrolments, are exempt from enrolment in courts of law or equity, or registration in any local registry (*r*), and are also

(*n*) Mortmain and Charitable Uses Act, 1888, s. 6.

(*o*) *Ibid.*, s. 4 (1).

(*p*) Mortmain and Charitable Uses Act, 1891, ss. 5, 6, 7.

(*q*) *Ibid.*, s. 8.

(*r*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), ss. 72, 77; Crown Lands Act, 1832 (2 Will. 4, c. 1), ss. 21, 28; Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 6; and as to enrolment of instruments of enfranchisement in Crown manors, see the Copyhold Act, 1894.

exempt from stamp duty. No assignment of a lease of Crown lands, however, and no instrument affecting the devolution of any such lease, now needs enrolment in this office (*s*).

SECTION 6.

NOTICE OF EXECUTION OF ASSURANCE.

When Necessary.—It should also be considered whether there are any persons to whom notice of the execution of the assurance should be given.

On the purchase of an equitable estate notice should be given to the persons having the legal estate, particularly in the case of an equity of redemption, to prevent further advances being made by the mortgagee to the mortgagor.

Notice of the conveyance should be given to tenants, since in the absence of notice the purchaser cannot recover rent which the tenant may subsequently pay to the vendor.

And on taking an assignment of leaseholds the lease should be carefully perused, in order to ascertain if there is any provision requiring notice thereof to be given to the lessor.

(*s*) Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 5.

CHAPTER XXII.

RIGHTS AND LIABILITIES OF VENDOR AND PURCHASER AFTER COMPLETION.

Purchaser's Rights and Liabilities.—We have now followed the various stages of the sale and transfer of real estate from the time the contract was entered into down to the completion of the transaction by the conveyance of the property. It remains to consider the relative rights and liabilities of the parties after completion. In the first place it is proposed to deal with the position of the purchaser where the property is not "in hand," *i.e.*, is bought subject to existing tenancies.

SECTION 1.

RIGHTS AGAINST TENANTS OF THE PROPERTY.

Lessee's Covenants run with Reversion.—At common law the covenants in a lease run with the land, but not with the reversion. The right of the purchaser to enforce the covenants in a lease, as assignee of the reversion, is conferred by statute, viz. in the case of leases prior to the Conveyancing Act, 1881, by the statute 32 Hen. 8, c. 34, and as to leases granted since December 31st, 1881, by ss. 10, 12 of the Conveyancing Act, 1881, and s. 2 of the Conveyancing Act, 1911. The statute of Henry the Eighth only applied to leases under seal (*a*), and it has been

(*a*) *Standen* v. *Christmas* (1847), 10 Q. B. 135; *Smith* v. *Eggington* (1874), L. R. 9 C. P. 145.

doubted whether s. 10 of the Conveyancing Act, 1881, applies to an agreement for a lease (*b*). But if the tenant is in occupation under an agreement for a lease of which specific performance could be obtained, and there are no equities between the parties to the original contract (*c*), the purchaser of the reversion can sue the tenant on the principle of *Walsh* v. *Lonsdale* (*d*), viz., that equity regards that as done which ought to have been done, and treats the relation of the parties as if specific performance had been enforced and a lease granted (*e*). Generally, therefore, it may be laid down that if the property purchased is subject to a lease or tenancy, the purchaser is entitled to the benefit of the lessee's covenants with the vendor, and may recover the rent due on the quarter day next after the conveyance. The purchaser cannot, however, recover arrears of rent which accrued due prior to the conveyance, since they are severed from the reversion and become a mere chose in action (*f*), unless, of course, these back rents are expressly assigned. Further, before 1912 the purchaser could not sue upon breaches of covenant which occurred before conveyance (*g*), unless the breach were a continuing one (*h*), nor could he enforce a condition of

(*b*) *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch., at p. 619.

(*c*) *I.e.*, between the vendor and tenant.

(*d*) (1882), 21 Ch. D. 9.

(*e*) *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch., at pp. 617, 618; *Rickett* v. *Green*, [1910] 1 K. B. 253.

(*f*) *Flight* v. *Bentley* (1835), 7 Sim. 151. See, however, *Rickett* v. *Green*, *supra*.

(*g*) *Johnson* v. *Churchwardens of St. Peter, Hereford* (1836), 4 A. & E. at p. 527; *Powell* v. *Hemsley*, [1909] 2 Ch. 252.

(*h*) *Martyn* v. *Williams* (1857), 26 L. J. Ex. 120.

re-entry in respect of such breaches (*i*). But by s. 2 of the Conveyancing Act, 1911, it is provided that s. 10 of the Act of 1881 shall apply to the benefit of every condition of re-entry or forfeiture for a breach of any covenant or condition contained in a lease, so as to enable the same to be enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased, although that person became, by conveyance or otherwise, so entitled after the condition of re-entry or forfeiture had become enforceable, provided that he became so entitled as aforesaid after the commencement of the Act.

On the same principle a purchaser cannot maintain an action for a wrong done in relation to the land by a third party before the sale, except where the wrong is a continuing one, as, for example, a permanent nuisance, or unless the right of action is expressly assigned with the property (*k*). On the other hand, the vendor, if he was the original lessor, still remains liable by privity of contract in respect of covenants entered into by him even after he has assigned the reversion (*l*).

Severance of the Reversion.—Under the statute of Henry the Eighth, the purchaser of the reversion in a part of the demised premises could sue for apportioned rent, but could not take advantage of a condition broken. It was, however, enacted by Lord St.

(*i*) *Cohen* v. *Tannar*, [1900] 2 Q. B. 612.

(*k*) *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 271.

(*l*) *Stuart* v. *Joy*, [1904] 1 K. B. 362.

Leonards' Act (*m*) that when the reversion upon a lease is severed and the rent or other reversion is *legally apportioned*, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation in like manner as if such condition or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him. With regard to leases made since December 31st, 1881, it is now provided by the Conveyancing Act, 1881 (*n*), that "Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease."

(*m*) 22 & 23 Vict. c. 35, s. 3.
(*n*) S. 12.

SECTION 2.

OBLIGATIONS TO TENANTS OF THE PROPERTY.

Lessor's Covenants run with Reversion.—Although, as we have seen, neither the benefit nor the burden of covenants run with the reversion at common law, the statute of Henry the Eighth (*o*) gives the like action and remedy against assignees of the reversion as the lessees might have had against the original lessors under the covenants in the lease. The reversion in the Act means the reversion which the lessor had in him at the date at which he granted the lease, and it has therefore been held that a covenant for perpetual renewal entered into by a person holding a limited interest in land does not bind the estate beyond that interest (*p*). With regard to leases granted after December 31st, 1881, the Conveyancing Act, 1881 (*q*), provides that "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the

(*o*) 32 Hen. 8, c. 34.
(*p*) *Muller* v. *Trafford*, [1901] 1 Ch. 54.
(*q*) S. 11.

person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled" (*r*).

Purchaser Bound by Equities.—Apart from the legal right of the tenant to enforce the covenants of a lease, the purchaser who buys with notice of a tenancy is bound by all the equities which the tenant could enforce against the vendor under his tenancy agreement, unless they were personal to the vendor. After completion, although not before, the rule applies that notice of a lease is notice of its contents (*s*); and the occupation of the land by a tenant affects the purchaser with constructive notice of all that tenant's rights (*t*).

But a purchaser is only affected with notice of the equities which the *tenant* can insist on, and notice of the tenancy is not notice of the title of the lessor. An intending purchaser is not bound to inquire of the tenants to whom they pay their rents, and is not affected with constructive notice that the vendor is out of possession or that he is trustee for some third party. Actual knowledge by the purchaser that the rents of the land are paid by the tenants to some person whose receipt of them is inconsistent with the title of the vendor is constructive notice of that

(*r*) This section has not altered the rule that the burden of covenants which are personal or collateral does not run either with the lease or the reversion (*Davis* v. *Town Properties Corporation, Limited*, [1903] 1 Ch. 797).

(*s*) *Lewis* v. *Stephenson* (1898), 67 L. J. Q. B. 296: *Re Derby and Fergusson's Contract*, [1912] 1 Ch. 479; Dart, Vendors and Purchasers, 7th ed., 884.

(*t*) *Daniels v. Davison* (1810), 17 Ves. 433.

person's rights; but mere knowledge that the rents are paid to an estate agent affects the purchaser with no notice at all (*u*).

SECTION 3.

LIEN OF THE UNPAID VENDOR.

Vendor's Rights.—Notwithstanding the execution of the conveyance and delivery of possession, and although such conveyance contains a receipt for the purchase money, the vendor retains a lien on the estate for the whole or any part of the purchase money remaining unpaid which prevails against all persons claiming as volunteers with or without notice, and also against subsequent assignees for value taking with notice (*x*). Of course, an assignee for value without notice who obtains the legal estate is not affected by the vendor's lien; and as against even an equitable assignee for value without notice, the unpaid vendor who has parted with the title-deeds and given a full receipt for the purchase money will be estopped from setting up his prior equitable estate (*y*).

It seems, notwithstanding a dictum to the contrary of ALEXANDER, L.C.B., that the lien of an unpaid vendor does not extend to the title-deeds, and that the title-deeds could be recovered by the purchaser at law after conveyance of the estate, even

(*u*) *Hunt* v. *Luck*, [1902] 1 Ch. 428.

(*x*) *Mackreth* v. *Symmons* (1808), Wh. & Tu., L. C. Eq., 8th ed., Vol. II., 946, and notes thereto.

(*y*) *Rice* v. *Rice* (1853), 2 Drew, 73; *Rimmer* v. *Webster*, [1902] 2 Ch. 175.

though the purchase money was unpaid, unless the conveyance was executed as an escrow to be delivered on payment of the money (z). But since the Judicature Act it is presumed that the vendor having an equitable charge is entitled to retain the title-deeds (a).

The lien is generally lost by taking an independent security for payment (b); but it will not be lost by the vendor taking a bond, bill of exchange, or promissory note, or other security which merely evidences or facilitates payment, even though a surety join therein (c).

The lien of the vendor is barred after twelve years (d).

SECTION 4.

RESCISSION AFTER COMPLETION.

Mistake.—After conveyance the vendor will have no remedy if the property prove more valuable than it was supposed to be (e); but the court has power to rectify a conveyance where there has been *common mistake*, as, for instance, where the conveyance

(z) *Goode* v. *Burton* (1847), 1 Ex. 189; *Austin* v. *Croome* (1842), 1 Car. & M. 653; *Harrington* v. *Price* (1832), 3 B. & Ad. 170.

(a) *Thurstan* v. *Nottingham Permanent Building Society*, [1902] 1 Ch., at p. 13; Dart, Vendors and Purchasers, 7th ed., 731.

(b) *Nairn* v. *Prowse* (1802), 6 Ves. 752; *Capper* v. *Spottiswoode* (1829), Taml. 21; *Bond* v. *Kent* (1692), 2 Vern. 281.

(c) Dart, Vendors and Purchasers, 7th ed., 733.

(d) Real Property Limitation Act, 1874, s. 8; *Toft* v. *Stephenson* (1848), 7 Hare, 1.

(e) *Okill* v. *Whittaker* (1847), 2 Ph. 338.

comprises more than either party intended to deal with (*f*).

In *Bingham* v. *Bingham* (*g*), the conveyance was set aside on the ground of common mistake, as it appeared that the vendor had purported to sell property which in reality belonged to the purchaser. In that case there was a total failure of consideration (*h*).

Fraud.—A conveyance may also be set aside on the ground of fraud, as in *Hart* v. *Swaine* (*i*), where it was held that the vendor had committed a *legal fraud* by making a false statement for the purpose of benefiting himself. This decision was treated by COTTON, L.J., as a case of *deceit* (*k*). It is clear, however, that if a misrepresentation was made in good faith and believed to be true at the time it was made, this is no ground for relief *after the conveyance*, either by way of compensation or by setting aside the whole transaction (*l*). If there has been an error *in substantialibus* sufficient to annul the whole contract, but there has not been a *total failure of consideration*, it is conceived that this will not justify

(*f*) *Leuty* v. *Hillas* (1858), 2 De G. & J. 110; *Beale* v. *Kyte*, [1907] 1 Ch. 564; *Stait* v. *Fenner*, [1912] 2 Ch. 504; and compare *Slack* v. *Hancock* (1912), 107 L. T. 14.

(*g*) (1748), Ves., Supplement, 79. In 1 Ves. 126 it is reported as an agreement to purchase, with no mention of conveyance.

(*h*) *Cf. Strickland* v. *Turner* (1852), 7 Ex. 208; *Hitchcock* v. *Giddings* (1817), 4 Price, 135.

(*i*) (1877), 7 Ch. D. 42; and *cf. Carpmael* v. *Powis* (1847), 11 Jur. 158.

(*k*) *Soper* v. *Arnold* (1887), 37 Ch. D. 102. It is now decided that there is no distinction between *legal* and *moral* fraud. See *Derry* v. *Peek* (1889), 14 App. Cas. 337.

(*l*) *Brownlie* v. *Campbell* (1880), 5 App. Cas., at p. 938.

rescission after conveyance (*m*). There are strong dicta to the effect that rescission after conveyance of land can only be obtained on the ground of unfair dealing (*n*).

Sales of Reversions.—The above remarks, however, only refer to the sale of estates *in possession* (*o*). In the case of sales by heirs, reversioners, or expectants, very different principles apply, and the court will presume fraud from "the *circumstances or conditions* of the parties contracting" (*p*); as, for instance, the youth of the vendor, his imperfect education, or the fact that he is in distress for money.

Fraud in this class of cases does not necessarily mean deceit or circumvention; "it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as primâ facie to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable (*q*).

Thus, in *Fry* v. *Lane* (*r*), where there was no evidence of actual fraud, the court set aside the sale

(*m*) *Re Tyrell* (1900), 82 L. T. 675; *Clare* v. *Lamb* (1875), L. R. 10 C. P. 334; *Debenham* v. *Sawbridge*, [1901] 2 Ch., at p. 109.

(*n*) *May* v. *Platt*, [1900] 1 Ch., at p. 623; *Brownlie* v. *Campbell* (1880), 5 App. Cas., at p. 937.

(*o*) *Cf. Webster* v. *Cook* (1867), L. R. 2 Ch. 542.

(*p*) See *Chesterfield* v. *Janssen* (1751), Wh. & Tu., L. C. Eq., 8th ed., Vol. I., 303, and notes thereto.

(*q*) *Earl of Aylesford* v. *Morris* (1873), L. R. 8 Ch. 490.

(*r*) (1888), 40 Ch. D. 312.

of a reversion by a poor and ignorant man at a considerable undervalue.

The Sales of Reversions Act, 1867 (*s*), enacts that no purchase made bonâ fide and without fraud and unfair dealing of any reversionary interest in real or personal estate shall hereafter be opened or set aside *merely on the ground of undervalue.* But this Act does not affect the case of an undervalue so gross as to amount of itself to evidence of fraud, and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief (*t*).

The court will also give relief, even when the estate is in possession, if the vendor is a poor and ignorant man, having no independent professional adviser, and has sold at a considerable undervalue (*u*).

SECTION 5.

DAMAGES AFTER COMPLETION.

When Purchaser can Recover.—Apart from the question of rescission, any action by the purchaser against the vendor after completion must be based on one of the following grounds: (1) Actual fraud on the part of the vendor sufficient to justify an action for deceit (*x*) ; (2) an express condition for compensation which is not confined to defects discovered before

(*s*) 31 Vict. c. 4.

(*t*) *Earl of Aylesford* v. *Morris*, *supra*; *O'Rorke* v. *Bolingbroke* (1877), 2 App. Cas. 814.

(*u*) *Wood* v. *Abrey* (1818), 3 Mad. 417; *Clark* v. *Malpas* (1862), 4 De G. F. J. 401; *James* v. *Kerr* (1889), 40 Ch. D., at p. 460.

(*x*) *Brett* v. *Clowser* (1880), 5 C. P. D. 376; *Joliffe* v. *Baker* (1883), 11 Q. B. D. 255.

completion (*y*); (3) a collateral contract entered into by the vendor (*z*); (4) the breach of some duty owed by the vendor to the purchaser during the period between the making of the contract and the conveyance (*a*); and (5) the grant or covenants by the vendor expressed or implied in the conveyance. After completion the maxim *caveat emptor* applies, and if the vendor's title proves defective, the purchaser must have recourse to his remedy upon the covenants for title (*b*).

Breaches of Covenants for Title.—The question sometimes arises under which of the four qualified covenants for title implied by the words beneficial owner a particular defect of title falls. This question may be important where the conveyance containing the implied covenants was executed many years ago; for whereas the covenant for quiet enjoyment is a *continuing* covenant, so that a right of action arises *toties quoties* when and as often as damage actually arises from the breach (*c*), the covenants for right to convey, and freedom from incumbrances, claims and demands, are not continuing covenants, and the breach is single and entire upon the execution of the

(*y*) *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351; *Clayton* v. *Leech* (1889), 41 Ch. D. 103; and as to whether the condition applies to defects of title, see *Debenham* v. *Sawbridge*, [1901] 2 Ch. 108, *ante*, p. 302.

(*z*) *Saunders* v. *Cockrill* (1902), 87 L. T. 30; but see *contra*, *Greswolde-Williams* v. *Barneby* (1901), 83 L. T. 708.

(*a*) *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456; *Conally* v. *Keating*, [1903] 1 I. R. 356; and see *ante*, p. 362.

(*b*) *Clare* v. *Lamb* (1875), L. R. 10 C. P. 334.

(*c*) Shep. Touch. 170.

conveyance (*d*). It therefore follows that the Statute of Limitations relating to actions of covenant (*e*) may be successfully pleaded as a defence to an action on the latter covenants (*f*), but not to an action for breach of the covenant for quiet enjoyment. The distinction is also important on the question of damages. An action may be brought for breach of the covenant for right to convey and freedom from incumbrances before any eviction or disturbance of the covenantee has taken place (*g*). The measure of damages for breach of these covenants is the difference between the value of the property as it purported to be conveyed, and its value as the vendor had, at the time of the conveyance, power to convey it (*h*). On the other hand, if the covenant for quiet enjoyment is broken, the damages may, it seems, include the amount expended on the property by the covenantee, *e.g.*, houses erected by him after the conveyance (*i*).

There are remarkably few English decisions upon covenants for title except as between lessor and lessee (*k*). The existence of restrictive covenants not mentioned in the conveyance has been held not to constitute a breach of the covenant for quiet enjoyment (*l*). But although a restrictive covenant

(*d*) *Turner* v. *Moon*, [1901] 2 Ch. 825.

(*e*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3.

(*f*) *Spoor* v. *Green* (1874), L. R. 9 Ex. 99.

(*g*) *Kingdon* v. *Nottle* (1815), 4 Moo. & S. 53.

(*h*) *Turner* v. *Moon*, [1901] 2 Ch. 825.

(*i*) *Bunny* v. *Hopkinson* (1859), 27 Beav. 565; *Great Western Rail. Co.* v. *Fisher*, [1905] 1 Ch. 316.

(*k*) For the American decisions, see Mayne, Damages, 215—227.

(*l*) *Dennett* v. *Atherton* (1872), L. R. 7 Q. B. 326; but see *Tritton* v. *Bankart* (1887), 56 L. J. Ch. 629.

cannot with propriety be called an incumbrance (*m*), it is a "burden in the nature of an incumbrance" (*n*), and would, it is presumed, fall within the covenant as to incumbrances, claims and demands. A right of way not disclosed by the conveyance, if it is in fact exercised, may constitute a breach of the covenant for quiet enjoyment (*o*); but if not in fact exercised it is only a breach of the covenant for right to convey the subject-matter freed and discharged from all estates, incumbrances, claims and demands other than those subject to which the conveyance is expressly made.

The benefit of covenants for title *runs with the land* (*p*), and an action can be brought in respect of privity of estate as distinguished from privity of contract (*q*). With regard to covenants entered into before the Conveyancing Act, the *legal estate* carried with it the whole right at law to sue on the covenant, and the assignees of an equity of redemption had no remedy because there was no legal estate with which the covenants could run (*r*). The benefit of the covenant implied by the Conveyancing Act is, however, annexed and incident to and goes with the estate or interest of the implied covenantee, and is capable of being enforced by every person in whom that estate or

(*m*) *Cato* v. *Thompson* (1882), 9 Q. B. D. 618.

(*n*) *Ellis* v. *Rogers* (1885), 29 Ch. D. 665; *Phillips* v. *Caldcleugh* (1868), L. R. 4 Q. B. 159.

(*o*) *Sutton* v. *Baillie* (1891), 65 L. T. 528.

(*p*) Dart, Vendors and Purchasers, 7th ed., 783.

(*q*) *David* v. *Sabin*, [1893] 1 Ch., at p. 537.

(*r*) *Onward Building Society* v. *Smithson*, [1893] 1 Ch., at p. 12.

interest is *for the whole or any part thereof* from time to time vested (*s*).

As already pointed out, it is no defence to an action on the covenants for title that the defect was disclosed by the conveyance or known to the purchaser (*t*); nor is it any defence to an action by a bonâ fide assignee that the original covenantee was guilty of fraud (*u*).

(*s*) Conveyancing Act, 1881, s. 7 (6).

(*t*) See *ante*, p. 434.

(*u*) *David* v. *Sabin*, [1893] 1 Ch. 536.

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